No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

ARACELY ZAMORA-GARCIA,

Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Fifth Circuit has correctly concluded that a lawful permanent resident ("LPR"), in removal proceedings has no right to a fair hearing, *i.e.,* Due Process, in the adjudication of her application for discretionary relief. *See, Jay v. Boyd*, 351 U.S. 345, 363 (1956) (alien is entitled to a fair hearing on application for suspension of deportation), and

2) Whether Due Process is abridged where a non-lawyer accredited by the Board of Immigration Appeals ("BIA"), to function as an attorney fails, without reasonable cause, to timely file an alien's application for relief from removal, and the BIA adopts the Immigration Judge's finding that the opportunity to file it was waived, and orders her removed.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner Aracely Zamora-Garcia was the Respondent before the Executive Office for Immigration Review, and the Petitioner before the Fifth Circuit Court of Appeals. The Respondent before the Fifth Circuit was the United States Attorney General.

REFUGIO DEL RIO GRANDE, Inc., which is filing the instant petition on behalf of Petitioner, is a not-for-profit, Section 501(c)(3) corporation. It has no stock, and no parent corporation.

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I. PETITION FOR WRIT OF CERTIORARI

Aracely Zamora-Garcia petitions this Honorable Court for a writ of certiorari to review the judgment issued in her case by the United States Court of Appeals for the Fifth Circuit. The primary issue presented is whether immigrants are entitled to Due Process, *i.e.*, a fair hearing, in the adjudication of applications for discretionary relief from removal. This question has been treated inconsistently not only between different circuits, but often within the same circuit. Indeed, confusion is rampant. As shown below, other than the Second,[1] Ninth,[2] and District of Columbia Circuits,[3] all of which have found that such a right exists, there is precedent from every other circuit, including the Fifth,[4] which arguably supports both sides of the question.[5]

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[1] *See, United States v. Copeland,* 376 F.3d 61, 72 (2d Cir. 2004) (distinguishing between the statutory right to apply for discretionary relief, and the desire to receive it, and finding a protected interest in the former, but not in the latter).

[2] *See, United States v. Ubaldo-Figueroa,* 364 F.3d 1042, 1048-49 (9th Cir. 2003) (finding that underlying deportation order violated Due Process and that waiver of right to appeal was not "considered and intelligent" because the IJ failed to advise him of the availability of §212(c) relief).

[3] *See, Gutierrez-Rogue v. INS,* 954 F.2d 769, 773 (D.C. Cir. 1992) (although there is no constitutional right to political asylum itself, an alien who has unlawfully entered the United States has a Fifth Amendment procedural due process right to petition for political asylum and a statutory procedural due process right to a meaningful or fair evidentiary hearing).

[4] *Compare, Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1039 (5th Cir. OLD 1982) (finding constitutionally protected interest in the right to be heard on an application for asylum, a form of discretionary relief); and the case cited by the Court in rejecting Ms. Zamora's Due Process claim, to wit, *Mireles-Valdez v. Ashcroft,* 349 F.3d 213, 214-15 (5th Cir. 2003) (dismissing Due Process claim regarding voluntary

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To the extent that there are consistent themes, it appears that a court is most likely to find that such a right *does* exist where the abridgment was committed by the Immigration Judge ("IJ"), and to conclude that it *does not* exist where the fault lies with counsel. This appears to be the case even in circuits which follow *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988),[6] holding that Due Process may be violated where counsel's performance is so deficient as to undermine the fundamental fairness of the hearing.[7]

The second issue presented is whether Due Process is abridged where a non-lawyer accredited by the BIA to function as an attorney fails, without reasonable cause, to timely file an LPR's application for relief from removal, and the BIA adopts the IJ's conclusion that she is obligated to find that the application has been abandoned, and order the LPR's removal. The responsibility of the Executive Office for Immigration Review ("EOIR"), under such circumstances is an issue of first impression, and Ms. Zamora's claim was rejected by the Fifth Circuit precisely

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departure, for lack of constitutionally protected interest in discretionary relief).

[5] The Federal Circuit is not considered because it does not presently hear petitions for review of removal orders.

[6] Respondent now challenges *Lozada*, citing this Court's decisions holding, in the context of criminal proceedings, that there can be no deprivation of effective assistance of counsel if there is no constitutional right to counsel. *See, Matter of Assaad,* 23 I&N Dec. 553 (BIA 2003). The Fifth Circuit has not yet ruled on this issue. *See, Assaad v. Ashcroft,* 378 F.3d 471 (5th Cir. 2004).

[7] *See, e.g., Mejia Rodriguez v. Reno,* 178 F.3d 1139, 1146 (11th Cir. 1999) (ineffective assistance of counsel did not impinge on the "fundamental fairness" of the hearing where it only deprived alien of right to seek discretionary relief, as he had no liberty or property interest in such relief).

because there was no "authority" on the subject. Appendix ("App."), *infra,* at p. 2.

II. OPINIONS BELOW

The decision of the Fifth Circuit herein was unreported. App. at p. 1. The decisions of the BIA and Immigration Judge ("IJ"), were also unreported. *Id.* at pp. 3 and 4.

III. JURISDICTION

The judgment of the Fifth Circuit was entered January 5, 2006. *Id.* at p. 1. Petitioner's timely petition for *en banc* rehearing was denied March 2, 2006. *Id.* at p. 17. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV. CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The instant case involves the Due Process Clause of the Fifth Amendment of the Constitution of the United States, to wit:

UNITED STATES CONSTITUTION, AMENDMENT V

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The following regulations are also involved:

1) 8 C.F.R. §287.3(c), App. at 19;

2) 8 C.F.R. §1003.61, *id.*;

3) 8 C.F.R. §1003.62(a), *id.* at 20;

4) 8 C.F.R. §1003.101(a), *id.* at 20;

5) 8 C.F.R. §1003.102(k), *id.* at 21; and

6) 8 C.F.R. §1292.2(a), *id.* at 22.

V. STATEMENT OF THE CASE

A. INTRODUCTION

Aracely Zamora seeks review of the Fifth Circuit's holding that aliens are not entitled to Due Process in that portion of a removal hearing addressing discretionary relief. Citing *Mireles-Valdez v. Ashcroft,* 349 F.3d 213, 214-15 (5th Cir. 2003), the Court concluded herein that the error of her accredited representative, which cost Ms. Zamora the right to seek cancellation of removal under 8 U.S.C. §1229b(a), did not deprive her of a fair hearing because it did not "implicate the violation of a due process right," and that therefore "the BIA did not err in denying her claim for lack of prejudice." App. at p. 2. Ms. Zamora asserts that this is incorrect for three reasons.

First, the Fifth Circuit's position is inconsistent with this Court's precedent. The right to a fair hearing, *i.e.,* Due Process, established by this Court encompasses the entire hearing, not just that portion relating to deportability. *See, e.g., Jay v. Boyd,* 351 U.S. 345, 363 (1956) (alien is entitled to a "fair hearing" on application for suspension of deportation); *U.S. ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954) (remanding for an evidentiary hearing in habeas corpus, on allegation of Due Process violation in adjudication of application for discretionary relief); *U.S. ex rel. Hintopoulos v. Shaughnessy,* 353 U.S. 72 (1957) (addressing denial of discretionary relief), and *Bridges v. Wixon,* 326 U.S. 135, 145 (1945):

> Here the liberty of an individual is at stake. . . . That deportation is a penalty – at times a most serious one – cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Further, the Solicitor General has conceded that a final order of removal constitutes "custody" under 28 U.S.C. §2241. *See, Rosales v. BICE*, 426 F.3d 733, 734 (5th Cir. 2005):

> The Supreme Court vacated the opinion after the government conceded in its brief to the Court that Rosales should be considered "in custody" according to the prevailing view in our sister circuits. *Rosales v. Bureau of Immigration and Customs Enforcement*, 162 L. Ed. 2d 271, ___ U.S. ___, 125 S.Ct. 2541 (2005). Reconsidering the case in light of the government's concession, we join the Second, Sixth, Ninth, and Tenth Circuits and hold that an alien who is subject to a final order of deportation, like Rosales, is "in custody" under § 2241.

Virtually by definition, one who is in "custody" by reason of an order of removal has a liberty interest in being released from that custody, *i.e.*, in having the removal order vacated. *See, e.g., Clark v. Martinez*, 543 U.S. 371 (2005) (addressing, in habeas corpus proceedings, the permissible limits of detention resulting from an un-executed order of removal).[8] *See also, Zalawadia v. Ashcroft*, 371 F.3d

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[8] The alleged lack of a liberty interest was relied upon by the District Court in denying habeas relief in another case currently before this Court, *Salazar-Regino et al. v. Moore et al.*, No. 05-547. The Fifth Circuit based its decision on other grounds, *Salazar-Regino v. Trominski*,

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292 (5th Cir. 2004) (a court's jurisdiction in habeas is limited to removing the unlawful custody created by the deportation order); and 8 U.S.C. §1252(a)(2)(D) (abrogating habeas review of removal orders, and replacing it with review of constitutional and statutory claims in the Courts of Appeals).

Alternatively, as applied to forms of relief such as cancellation of removal, under 8 U.S.C. §1229b(a), Ms. Zamora disputes the Fifth Circuit's reasoning, to wit, that she has no Due Process rights because she has neither a property nor liberty interest in her application for relief. She claims property interests based on the fee paid to file the application, App. at p. 47, and the loss of income and other economic consequences that flow from its denial. Further, the Attorney General's discretion to grant or deny cancellation of removal under §1229b(a) is not "unfettered," as many courts assume. *See, e.g., United States v. Torres*, 383 F.3d 92, 103 (3rd Cir. 2004) (Since 8 U.S.C. §1182(c) left to the IJ's sole discretion whether to grant relief, it creates no liberty or property interests).

As noted in *INS v. Yueh-Shiao Yang*, 519 U.S. 26, 32 (1996), the Attorney General's previously "unfettered" discretion may be restricted by a settled course of adjudication. And the form of discretionary relief involved herein has been so circumscribed as to be subject to what this Court characterized in *INS v. St. Cyr*, 533 U.S. 289, 296 (2001) as "comparable to common-law rules for deciding when deportation is appropriate."[9] Such substantive

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415 F.3d 436 (5th Cir. 2005), but the question of a "liberty interest" may resurface in that case.

[9] Although the Court referred therein to the standards for adjudicating applications for §212(c) relief, as the BIA held in *Matter of C-V-T-*,

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restrictions give rise to constitutionally protected interests. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (finding interest in discretionary benefit to be constitutionally protected where rules and standards restrict the exercise of discretion); and *Landon v. Plasencia*, 459 U.S. 21, 26-27 (1982) (characterizing the ability to apply for discretionary relief as a "substantive right"). *See also, Hernandez v. Reno*, 238 F.3d 50, 55-56 (1st Cir. 2001) ("waivers are granted or withheld according to largely fixed criteria, *Yepes-Prado v. INS*, 10 F.3d 1363, 1365-66 (9th Cir. 1993), and have an enormous practical impact.")

Ms. Zamora also asserts that her removal hearing did not comport with fundamental fairness, because she did not have a fair hearing on her application. As the BIA held in *Matter of Lozada, supra*, and reaffirmed in *Matter of Assaad, supra*, ineffective assistance of counsel can create a Due Process violation, where, as here, counsel's error prevents an alien from presenting his/her case.

The problem was compounded by the IJ's inflexible approach, which the BIA affirmed. Ms. Zamora's representative was a non-lawyer accredited by the BIA to function as an attorney, under 8 C.F.R. §1292.2(d). His discipline was the sole responsibility of the Attorney General, 8 C.F.R. §§1003.101 and 1003.102. He was employed by an organization recognized by the BIA, 8 C.F.R. §1292.2(b), as qualified under 8 C.F.R. §1003.62 to be included on the list of free legal services mandated by 8 C.F.R. §1003.61, which list was provided to Ms. Zamora when she was arrested, as required by 8 C.F.R. §287.3(c). App. at p. 48.

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22 I&N Dec. 7 (BIA 1998), the same standards and procedures apply to applications under 8 U.S.C. §1229b(a).

Yet when the representative failed, without cause, to timely file or seek an extension of time to file the application, the IJ considered that she had no choice but to deem it abandoned and order Ms. Zamora's removal. *Cf.,* 8 C.F.R. §1003.31(c) (the opportunity to file an application "shall be deemed waived" if it is not filed within the time set by the IJ).

Ms. Zamora asserts that, at least in the context of a late filing by a non-lawyer whose competence the BIA has certified, such inflexibility is a denial of the fair hearing guaranteed by the statute. *See, Jay v. Boyd, supra.*

B. THE FACTUAL AND PROCEDURAL BACKGROUND

Aracely Zamora-Garcia is a Mexican national who was brought to the United States when she was four or five years old, and became a lawful permanent resident in 1982, at the age of nine. She has extensive family ties in the United States, including both parents, and seven siblings. She has held relatively steady employment since she started working in 1996, primarily doing unskilled labor, and has regularly filed her income tax returns. App. at pp. 30-48.

In February, 2000, Ms. Zamora was arrested for aiding and abetting the illegal entry of two young girls. She received $1,000 from their father including airfare and other expenses, to take them to their mother in Indiana. When confronted, she readily admitted her error, and gave a sworn statement. She was placed in removal proceedings, and referred for prosecution. She pled guilty to a misdemeanor, and was sentenced to sixty days, of

which she served between thirty and forty days. App. at pp. 26-29, 40 and 48.

As required by 8 C.F.R. §287.3(c), when Ms. Zamora was arrested, she was given a list of organizations recognized by the Attorney General which provide free or low cost legal services. Before the Immigration Court, Ms. Zamora was represented by Alberto Cruz, a non-lawyer employed by one of these organizations, and accredited by the BIA to function as an attorney. She admitted deportability, and sought cancellation of removal, 8 U.S.C. §1229b(a). The IJ ordered that the application and supporting documents be filed by September 4, 2001, and scheduled a hearing on the merits for September 20, 2001. Ms. Zamora gave Mr. Cruz the information to prepare the application, the filing fee, and supporting documents. On August 28, 2001, Mr. Cruz tendered the original application to INS for processing of the fee. It was fee-stamped, and returned to him for filing with the Immigration Court. But he neither timely filed it, nor requested an extension. Rather, he filed it, and served INS, on September 17, 2001. App. at pp. 4-6, 30, 44, and 47.

On September 20, 2001, Ms. Zamora went to Court for the hearing on the merits of her application. Because it had been filed late, and without even claiming prejudice, INS urged the IJ to deem it abandoned. After listening to Mr. Cruz' attempted justification, and finding that he had no "adequate" excuse for his failure, the IJ considered herself obligated to deem that Ms. Zamora had waived the opportunity to seek relief, and ordered her removal. *Id.* at pp. 7, 10-12. In an obvious allusion to the possibility of relief under *Matter of Lozada, supra*, the IJ advised her as follows, *id.* at p. 12:

> To the extent that you have any problem with the fact that Mr. Cruz did not file your application by the deadline, I can only suggest that you consult with . . . an attorney about that. Do you understand?

Ms. Zamora appealed to the BIA. Through new counsel, she argued ineffective assistance of counsel, under *Lozada,* and showed prejudice, to wit, a high likelihood that she would have earned relief, given her otherwise clean record, and outstanding equities, including rehabilitation. She also argued that where facts showing ineffective assistance of an Accredited Representative were before the IJ, the IJ erred by finding that she had "waived" her opportunity to seek relief. Since the Attorney General had certified Mr. Cruz' competence, and was responsible for his discipline, Ms. Zamora urged that the IJ should have initiated disciplinary proceedings, and either proceeded with the merits hearing, or continued the case, if INS asserted prejudice from the late filing. In dismissing her appeal, the BIA implicitly rejected that argument, by adopting and affirming the IJ's decision. The BIA also rejected her ineffective assistance claim, allegedly for failure to show prejudice. App. at p. 3.

Ms. Zamora timely petitioned for review, under 8 U.S.C. §1252. She expanded on the arguments made before the BIA, and urged that she had shown prejudice as a matter of law. The Fifth Circuit rejected her claim that the Attorney General bore some responsibility for the conduct of the non-lawyer representatives it accredits, for lack of prior authority on the subject. Citing *Mireles-Valdez, supra,* the Court also rejected her ineffective assistance of counsel argument, for lack of a constitutionally protected interest in discretionary relief. App. at pp. 1-2.

VI. REASONS FOR GRANTING THE WRIT

This Court regularly grants certiorari to resolve circuit conflicts over the meaning of the immigration laws. *See, e.g., Lopez v. Gonzales* (No. 05-547); *Fernandez-Vargas v. Gonzales* (No. 04-1376); *Leocal v. Ashcroft,* 543 U.S. 1 (2004); *Demore v. Kim,* 538 U.S. 510, 516 (2003). The Court also grants certiorari where Circuit Court opinions are in conflict with prior Supreme Court precedent. *See, e.g., Clark v. Martinez, supra.* Both aspects are presented herein.

A. THERE IS WIDESPREAD CONFUSION AS TO WHETHER ALIENS HAVE DUE PROCESS RIGHTS IN THE RELIEF PHASE OF A REMOVAL HEARING, WHERE THE RELIEF SOUGHT IS DISCRETIONARY.

1. The Position of the Fifth Circuit Conflicts With Relevant Decisions of This Court.

Recent Fifth Circuit precedent holding that non-citizens have no right to Due Process in the adjudication of applications for discretionary relief from removal conflicts with relevant decisions of this Court, which has heard several cases where deportable aliens challenged the denial of discretionary relief on the grounds that they did not receive a "fair hearing," *i.e.,* that they were denied Due Process. *See, e.g., Jay v. Boyd, supra* (emphasis added):

> [The petitioner] is entitled to suspension "in the discretion" of the Attorney General if he "proves" that during the preceding 10 years he has been a person of good moral character and if deportation would result in exceptional and unusual hardship. *The language of the statute plainly shows that an alien must be given an opportunity to*

> *"prove" these things if he can. This of course means that he must have a full and fair hearing.*

Although *Jay* arose under the 1952 Immigration Act, this Court has heard similar cases from the period when Congress permitted only that review "required by the Constitution," to wit, through habeas corpus. *See, Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953). For example, in *Accardi*, this Court vacated the denial of discretionary relief and remanded for an evidentiary hearing to determine whether the Attorney General had influenced the BIA's exercise of discretion in a manner inconsistent with the regulations. *Id.*, 347 U.S. at 267 (emphasis added) (footnote in original):

> If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, *after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.* n8 Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, *but at least he will have been afforded that due process required by the regulations in such proceedings.*
>
> n8 See the *Bilokumsky* and *Bridges* cases cited in note 7, *supra*.

The citation to *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); and *Bridges v. Wixon, supra*, is revealing

because those cases addressed the requirements of a fair hearing in determining alienage, and deportability, respectively. This citation thus implies that the constitutionally mandated fair hearing requirement applies to all aspects of a deportation hearing, including that portion addressing discretionary relief.

Accardi is also significant because the majority rejected the dissent's contention that habeas review was available only to challenge the finding of deportability, and did not extend to the denial of discretionary relief. In *Accardi*, the asserted violation of the right to a fair hearing arose from an alleged failure to abide by the "process" prescribed by the regulations.[10] *See also, Hintopoulos v. Shaughnessy, supra* (reviewing denial of discretionary relief), and *Kwock Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (holding that decisions in immigration cases were final unless, *inter alia,* "the proceedings were manifestly unfair," or inconsistent with the "fundamental principles of justice embraced within the conception of due process of law").

The dismissal of Ms. Zamora's petition for review, under *Mireles-Valdez, supra*, is thus clearly inconsistent with this Court's precedent regarding the contours of the fair hearing requirement in deportation cases. Recently, several Courts of Appeals, including the Fifth Circuit, have replaced this analysis with a more limited Due Process analysis, applied to discrete aspects of the hearing. Even

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[10] In accordance with this principle, the BIA has long held that violation of a regulation intended to benefit the alien, when coupled with prejudice, violates Due Process. *See, e.g., Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

within this line of cases, however, there is little consistency.

2. The Current Position of the Fifth Circuit Also Conflicts With Its Prior Precedent, Including *Haitian Refugee Center v. Smith*, and *U.S. v. Calderon-Pena*.

It is ironic that one of the earliest circuit court decisions under the 1952 Immigration Act finding a Due Process right to be heard on an application for discretionary relief emanated from the (old) Fifth Circuit, prior to its separation from what is now the Eleventh Circuit, but that those two Courts have lost sight of that holding, and are now among the most adamant in finding that no such right exists. In *Haitian Refugee Center v. Smith, supra,* that Court found a sufficient liberty interest to support a Due Process right to be heard on an application for asylum, which is also a discretionary form of relief. *See,* 8 U.S.C. §1158(b) ("The Attorney General may grant asylum to an alien who . . . "). Both Circuits continue to cite this case for such matters as its explanation of the *content* of the right to a fair hearing,[11] even as they ignore the aspect recognizing

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[11] *See, Zhang v. Gonzales*, 432 F.3d 339, 346 (5th Cir. 2005):

> "The constitutional adequacy of the exact timing and nature of the required hearing must be judged by balancing the competing private and governmental interests at stake." Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1040 (Former 5th Cir. 1982).

See also, Tefel v. Reno, 180 F.3d 1286, 1297 (11th Cir. 1999), noting that:

> In Smith, we stated that "our holding is not to be construed as permitting a constitutional challenge in the district court based on a procedural ruling in a deportation proceeding with which an alien is dissatisfied."

the *existence* of such a right in adjudicating an application for discretionary relief.

In the case at bar, the Fifth Circuit also ignored the fact that it had recently discussed *Accardi* and affirmed its continued vitality in the context of reviewing removal orders. *See, United States v. Calderon-Pena*, 383 F.3d 254, 256 (5th Cir. 2004) ("reinstat[ing] that portion of the panel opinion, *United States v. Calderon-Pena*, 339 F.3d 320, 323-25 (5th Cir. 2003), that rejected Calderon-Pena's attempt to collaterally attack his prior removal"). The reinstated portion of the panel opinion included the discussion of *Accardi*, 339 F.3d at 324-25 (emphasis added):

> In considering Accardi's application for writ of habeas corpus, *the Court concluded that he had sufficiently alleged a due process interest in having the INS follow its own regulations*, so the Court remanded to the district court with instruction to determine whether there had, in fact, been a prejudgment and, if so, to order a new administrative hearing. Id. at 268.
>
> Calderon-Pena does not cite, nor have we located, any cases applying Accardi in the criminal context; all examples of relief granted came either via direct appeal of an administrative ruling or by writ of habeas corpus. *In civil proceedings, Accardi is applied by ordering a new administrative hearing, and therefore courts do not require a showing of prejudice.* Here, we are not empowered to order, nor has Calderon-Pena requested, a new deportation hearing; rather, we may only dismiss the indictment for his subsequent illegal reentry. This is not a remedy contemplated by Accardi or its progeny.

Here, such a challenge was raised "via direct appeal of an administrative ruling," and specifically invoked both *Accardi,* and *Haitian Refugee Center*. Yet the Fifth Circuit declined to address it, either in the panel decision, or *en banc*.

Similarly, the Eleventh Circuit now holds that there is no liberty or property interest, and therefore no Due Process right, in any application for discretionary relief. *See, e.g., Mejia Rodriguez, supra* at 1146-48 (an alien's right to due process does not extend to proceedings that provide only discretionary relief), and *Tefel v. Reno, supra* at 1300 (failure to receive discretionary relief does not deprive an alien of a constitutionally protected liberty interest). Ironically, in *Tefel*, the Court cited *Haitian Refugee Center* nine times, but never once mentioned that it had found Due Process rights in applications for a form of discretionary relief, *e.g.*, asylum. In a recent unpublished decision, the Eleventh Circuit even applied this reasoning to an alien seeking asylum. *Restrepo v. United States AG*, 137 Fed. Appx. 267, 268-69 (11th Cir. 2005) (attorney's deficient representation does not deprive an alien of due process if it only prevents him from being eligible for asylum, because the failure to receive discretionary relief does not amount to a deprivation of a liberty interest).

3. Apart From Those Circuits Which Have Found Due Process Rights in Applications For Discretionary Relief, Virtually Every Other Circuit Has Issued Decisions Which Support Both Sides Of The Issue, Without Attempting To Reconcile The Disparate Reasoning and Results.

A circuit-by-circuit analysis is revealing. The issue of Due Process or "fair hearing" rights with respect to applications for discretionary relief has been addressed, in one form or another, by every circuit except the Federal Circuit. As mentioned above, the Second, Ninth, and District of Columbia Circuits have all found that such a right exists. Recent precedent from the Fifth And Eleventh Circuits indicates that there is no such right in any form of discretionary relief, for lack of a property or liberty interest therein. *See, e.g., Assaad v. Ashcroft, supra,* and *Garcia v. AG of the United States*, 329 F.3d 1217, 1224 (11th Cir. 2003) ("the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest"). And, there is precedent from each of the remaining circuits which arguably supports both sides of the question.

Three First Circuit decisions exemplify the different approaches, and perhaps indicate a path to resolving the conflict. In *Carranza v. INS*, 277 F.3d 65, 71-72 (1st Cir. 2002), the Court discussed *Accardi, Jay*, and similar cases, and concluded that in matters relating to discretionary relief, these cases stood for the proposition that "the alien had a right to the process, enforceable by habeas if need be, but no right to a particular result." *Id.* at 71. In *Jupiter v. Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005), the First

Circuit concluded that the alien could not premise a due process claim solely on the denial of the opportunity to extend a grant of voluntary departure, for lack of a cognizable liberty or property interest in such relief. This result doubtless could be reconciled with *Carranza,* although *Carranza* was not mentioned therein. And in *United States v. Luna*, 436 F.3d 312, 319-21 (1st Cir. 2006), that Court declined to take a position as to whether the failure of an IJ to advise an LPR of the possibility of §212(c) relief rendered the proceedings "fundamentally unfair," because the petitioner in that case had not shown prejudice, *i.e.,* "a reasonable likelihood that he would have received relief from deportation," *id.* at 21. Again, there was no mention of *Carranza.* Assuming that *Jupiter* is understood in the context that the issue involved an extension of voluntary departure, for which no "process" is prescribed, and therefore, none was overlooked, these opinions are not necessarily inconsistent.

A similar ambivalence is shown by the Third Circuit, which has repeatedly held that Due Process is violated where the actions of the IJ, or the alien's attorney, deprive him or her of a fair hearing on an application for discretionary relief, but has also held that the IJ's failure to advise an eligible LPR of the availability of §212(c) relief did not render the hearing fundamentally unfair. *Compare, e.g., Muhanna v. Gonzales*, 399 F.3d 582 (3d Cir. 2005) (finding that the IJ's conduct of the hearing on relief from removal deprived the alien of due process); *Cham v. Attorney General of the United States*, ___ F.3d ___, 2006 U.S. App. LEXIS 10595 (3d Cir. 2006) (same), and *Zheng Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005) (ineffective assistance of counsel may constitute a denial of due

process if the alien was prevented from reasonably presenting his case), *with United States v. Torres*, 383 F.3d 92, 103 (3rd Cir. 2004) (hearing not fundamentally unfair because the alien had no property or liberty interest in eligibility for §212(c) relief).

However, case law from other circuits is not so easily reconciled. *Compare, Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002) ("[D]ue process requires, at a minimum, that the INS adopt procedures to ensure that asylum petitioners are accorded an opportunity to be heard at a meaningful time and in a meaningful manner, i.e., that they receive a full and fair hearing on their claims"), *with Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (aliens have "no protected liberty or property interest in discretionary 212(c) relief"). *Compare also, Gjyzi v. Ashcroft*, 386 F.3d 710, 714 (6th Cir. 2004) ("as a matter of due process, assigning complete discretion to an agency to apply the law does not allow that decisionmaker to ignore the law") and *Castellano-Chacon v. INS*, 341 F.3d 533, 553 (6th Cir. 2003) (Although there is no constitutional right to asylum, aliens facing removal do have a constitutionally protected right to a full and fair hearing), *with Ashki v. INS*, 233 F.3d 913, 920-21 (6th Cir. 2000) (finding no Due Process rights for lack of constitutionally protected interests in suspension of deportation). *Compare also, Galicia v. Gonzales*, 422 F.3d 529, 538-39 (7th Cir. 2005) (IJ's conduct of hearing deprived alien of full and fair opportunity to put on her case for discretionary relief), and *Podio v. INS*, 153 F.3d 506, 509 (7th Cir. 1998) ("the issue is whether the original deportation hearing was conducted in a fair enough fashion for one to determine that the BIA's decision [denying asylum] was based on reasonable, substantial, and probative evidence"), *with Hamdan v. Gonzales*,

425 F.3d 1051, 1060-61 (7th Cir. 2005) ("an alien's right to due process does not extend to proceedings that provide only discretionary relief"), and *Ali v. Ashcroft*, 395 F.3d 722, 732 (7th Cir. 2005) (same). And, *compare Shoaira v. Ashcroft*, 377 F.3d 837, 843 (8th Cir. 2004) (conducting *de novo* review, and finding that IJ's conduct of the hearing did not deprive the asylum applicants of Due Process), *with Obleshchenko v. Ashcroft*, 392 F.3d 970, 971 (8th Cir. 2004) (because asylum is a form of discretionary relief, aliens "had no right to effective assistance with respect to their asylum claim"). And finally, *compare Kowalczyk v. INS*, 245 F.3d 1143, 1147-48 (10th Cir. 2001) (finding Due Process violation in adjudication of asylum application because the BIA took administrative notice of certain facts without giving the alien an opportunity to rebut the noticed facts), *with United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) (finding no constitutional right to be informed of the existence of discretionary relief, for lack of a constitutionally protected interest), and *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1293 (10th Cir. 2001) (finding that because the regulation at issue contained no standards, it did not create a liberty interest, and the "petitioners' failure to receive discretionary relief does not therefore rise to a constitutionally protected interest").

4. The Issue Is of Great Import, Given the Fundamental Interests at Stake, Particularly for LPRs and Asylum Seekers, and the Exceptionally Broad Range of Conduct That Can Cause An LPR to Be Removed, but for the Fact That Some Form of Discretionary Relief Is Available.

The current confused state of the law has profound implications, particularly for LPRs such as Ms. Zamora, and asylum seekers. Fundamental interests, including liberty, and life itself, are at stake. *See, e.g., Bridges v. Wixon, supra*; *Landon v. Plasencia, supra*; and *Ardestani v. INS*, 502 U.S. 129, 140 (1991), Justice Blackmun, with whom Justice Stevens joined, dissenting:

> The alien's stake in the [deportation] proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive.

When coupled with the huge expansion of grounds of deportability ushered in by the 1996 amendments, and the retroactive application of these grounds, the fight for discretionary relief often becomes, as here, the whole battle. It would be unconscionable to conclude that there is no right to a fair hearing on such applications because the underlying relief is discretionary. It would also create an odd dichotomy, where aliens could complain of legal errors in the adjudication of applications for discretionary relief, as in *St. Cyr*, but not of constitutional violations.

B. THIS COURT SHOULD ALSO DETERMINE WHETHER DUE PROCESS IS ABRIDGED WHERE A NON-LAWYER CERTIFIED BY THE ATTORNEY GENERAL TO FUNCTION AS AN ATTORNEY COMMITS AN ERROR WHICH CAUSES AN LPR TO LOSE THE OPPORTUNITY TO SEEK RELIEF FROM REMOVAL.

Finally, the Court is urged to determine what responsibility, if any, the Attorney General has to oversee the conduct of accredited representatives, the non-lawyers accredited by the BIA to function as attorneys in immigration court, under 8 C.F.R. §1292.2(d), and whether an immigrant can complain of a Due Process violation where such a representative commits an error which is fatal to her case. Accredited representatives work for organizations certified by the BIA, 8 C.F.R. §1292.2(b), and are included on lists of free legal services which must be given to aliens when arrested, 8 C.F.R. §287.3(c), and which the IJ must also ensure that the aliens received, 8 C.F.R. §1240.10(a)(2). Immigration Judges and the BIA are empowered to make findings that they have provided ineffective assistance, and to impose disciplinary measures. 8 C.F.R. §1292.3, 8 C.F.R. §1003.101 and §1003.102. Under 8 C.F.R. §1003.102, the discipline of accredited representatives "is deemed to be in the public interest" when they engage in certain conduct, including that which constitutes "ineffective assistance of counsel," but only if the IJ or BIA makes such a finding. 8 C.F.R. §1003.102(k).

Unfortunately, in the case at bar, although the facts were before the IJ, showing that the accredited representative had failed to timely file, or request an extension of time to file, Ms. Zamora's application for relief, the IJ

made no explicit finding of ineffective assistance. Nor did the BIA make such a finding, even though the Board did not dispute that Mr. Cruz' representation was ineffective, and that Ms. Zamora had complied with the procedural requisites of *Matter of Lozada, supra*.

In *Matter of Rivera-Claros,* 21 I&N Dec. 599 (BIA 1996), the BIA explained the processes established in *Lozada* for addressing complaints of ineffective assistance by counsel. The BIA conceded that "regulations do exist for the disciplining of attorneys appearing before Immigration Judges," but noted that the EOIR "is already stretched in terms of its adjudicatory resources," 21 I&N Dec. at 605, and that it therefore relies on the grievance processes of the bar associations "as the first, and ordinarily the fastest, means of identifying and correcting possible misconduct," *id.* at 604. As the Board concluded therein, "[i]n this way, this Board's interest in having a method of monitoring those attorneys who practice before us is addressed," *id.*

However, this process only functions when the malfeasance is committed by a licensed attorney. Discipline of errant Accredited Representatives is the sole responsibility of the Attorney General. Unfortunately, as illustrated by the case at bar, it is a responsibility which the Attorney General has not fully shouldered.

The EOIR website maintains lists of disciplined practitioners.[12] Mr. Cruz is not named therein. And, as

[12] www.usdoj.gov/eoir/profcond/chart.htm.

would be expected from *Matter of Rivera-Claros, supra,* the current list notes:[13]

> In most cases, the disciplinary action is initiated as a result of sanctions imposed by other jurisdictions or a criminal conviction.

Obviously, non-lawyers are not subject to sanctions by "other jurisdictions." Therefore, given the Attorney General's failure to fully implement the oversight mandate contemplated by 8 C.F.R. §1003.101, even accredited representatives who frequently miss deadlines, and have earned a reputation for egregious negligence, are free to inflict sometimes irreparable damage on unsuspecting immigrants, who, like Ms. Zamora, have sought their assistance through the list of free legal service organizations created by the Attorney General, and given to them when they are placed in removal proceedings, and/or by the Immigration Judge.

Ms. Zamora urges that the Attorney General's role in certifying free legal service organizations and accrediting their non-lawyer representatives, and implicitly guaranteeing their competence by ensuring that everyone placed in removal proceedings receives a list of these organizations, creates a *duty* on the part of the IJ to make the necessary findings of ineffective assistance when such a circumstance is found to exist. Here, Ms. Zamora urges that once she determined that Mr. Cruz had no "adequate" excuse for failing to timely file the application, or seek additional time, the IJ should have made such a finding, and taken reasonable steps to secure Ms. Zamora's rights, such as by allowing her to proceed with the hearing, *pro*

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[13] www.usdoj.gov/eoir/press/06/AttyDiscMay06.htm.

se, if necessary, or, if DHS had claimed prejudice from the late filing, by continuing the proceedings.

As noted by the Fifth Circuit, there is no "authority" on this subject. App. at 2. However, it is clearly an issue of great import for those, like Ms. Zamora, who have been victimized by the combination of the negligence of an Accredited Representative, and the refusal of the Attorney General to fully implement the procedures provided by the regulations for disciplining accredited representatives.

VII. CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to the Fifth Circuit, to resolve the inter- and intra-circuit court conflicts on the crucial issue of whether an immigrant's right to a fair removal hearing ceases once a finding of deportability has been made, and to determine whether Ms. Zamora, and dozens if not hundreds of similarly situated aliens are entitled to relief from the extreme consequences which flow from the failings of the non-lawyers the Attorney General accredits to function as attorneys, as aggravated by the Attorney General's failure to conduct meaningful oversight over these non-lawyers.

Respectfully submitted,

LISA S. BRODYAGA, ESQ.
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(956) 421-3226 (voice)
(956) 421-3423 (fax)

161 Fed.Appx. 397

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60255
Summary Calendar

ARACELY ZAMORA-GARCIA,

Petitioner,

versus

ALBERTO R. GONZALES, U. S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A37 005 740

(Filed Jan. 5, 2006)

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Aracely Zamora-Garcia, a citizen of Mexico, has filed a petition seeking review of the Board of Immigration

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appeals ("BIA") decision dismissing her appeal of the immigration judge's ("IJ") decision to deny her application for cancellation of removal as untimely. Because Zamora-Garcia's petition for initial hearing en banc does not meet the requirements set forth in FED. R. APP. P. 35(b), that petition is DENIED. Respondent's motion for summary disposition and Zamora-Garcia's motion to strike respondent's motion are DENIED. Further briefing, however, is not necessary.

Zamora-Garcia argues that the BIA and IJ had a duty to protect her from the alleged ineffectiveness of her accredited representative ("AR"). We are unaware of and Zamora-Garcia does not cite any authority which supports or forms a basis for her argument. Zamora-Garcia also argues that the BIA erred by rejecting her ineffective-assistance claim. Because Zamora-Garcia's claim did not implicate the violation of a due process right, the BIA did not err in denying her claim for lack of prejudice. *See Mireles-Valdez v. Ashcroft,* 349 F.3d 213, 214-15 (5th Cir. 2003). Accordingly, Zamora-Garcia's petition for review is denied.

PETITION FOR REVIEW DENIED; PETITION FOR INITIAL HEARING EN BANC, MOTION FOR SUMMARY DISPOSITION, AND MOTION TO STRIKE MOTION FOR SUMMARY DISPOSITION DENIED.

U.S. Department ofJustice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A37-005-740-SAN ANTONIO Date: MAR 24, 2004

In re: ZAMORA-GARCIA, ARACELY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brodyaga, Lisa S., Esquire

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). Although the respondent claims that her attorney ineffectively represented her, she has not established that she was prejudiced by his representation. See Matter of Assaad, 23 I&N Dec. 553 (BIA 2003). The respondent was convicted of alien smuggling. She has presented no significant evidence that her equities outweigh this offense. As there appears to be little likelihood of success should the appeal be sustained, we will dismiss the appeal. Accordingly, the appeal is dismissed.

Roger A. Pauley
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Antonio, Texas

File No.: A 37 005 740 September 20, 2001

In the Matter of	)
ARACELY ZAMORA-GARCIA	) IN REMOVAL) PROCEEDINGS
Respondent	)

CHARGE: Section 237(a)(1)(E)(i) – alien smuggling activity.

APPLICATION: Cancellation of removal under Section 240A(a).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Alberto Cruz Accredited Representative Central Aslande 406 God Street Laredo, TX 78040	Martha Buxton Assistant District Counsel U.S. Immigration Service P.O. Box 1939 San Antonio, TX 78297-1939

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a citizen of Mexico, who has been a lawful permanent resident of the United States since 1982. She was placed in removal proceedings on March 30, 2000, by the filing with the Immigration Court of the Notice to Appear, Exhibit 1, wherein, she was charged with being subject to removal under Section 237(a)(1)(E)(i) of the Immigration and Nationality Act (Act).

The Service lodged additional factual allegations in the Form I-261, Exhibit 2. The charge of removal was based upon allegations that the respondent had applied for

admission as a returning resident on February 9, 2000, and at that time knowingly encouraged, induced, assisted, aided, or abetted certain aliens to enter or try to enter the United States in violation of law.

The respondent, through counsel, admitted all six of the factual allegations contained in the charging documents and conceded that she was subject to removal as charged.

The Service also submitted documents to support the allegations and the charge, Exhibit 3, including a Form I-213 and a record of sworn affidavit from the respondent.

Based upon the respondent's admissions and the evidence submitted by the Service, the Court is satisfied that the respondent is subject to removal as charged.

The respondent indicated that she would seek relief from removal in the form of cancellation under Section 240A(a) of the Act.

The Court set specific deadlines for the respondent to have her fingerprints taken by April 30, 2001 and to submit her application to the Court with supporting documents by September 4, 2001.

At the final hearing, the Court had received the respondent's application, marked for identification purposes as Exhibit 4. It was received, however, on September 17, 2001, There was no prior request from the respondent's counsel to extend the submission date beyond September 4.

The respondent's counsel advised the Court of the reason for the late filing, indicating that he had difficulty in communicating with the respondent in order to complete the application. The Court notes, however, that the

fee stamp is August 28, 2001. The document was fee stamped by the Immigration Service on that date.

The Court does not find counsel's explanation for the failure to timely file the application with the Court or even to request an extension of the time to file as sufficient reason to except the late filing of the application. The Court deems the application abandoned for failure to timely file.

The respondent seeks no other form of relief.

Accordingly, the following order shall be entered:

ORDER

1. The charge under Section 237(a)(1)(E)(i) of the Act is sustained.

2. The respondent's application for cancellation of removal under Section 240A(a) of the Act is pretermitted and denied for failure to timely file.

3. The respondent is ordered removed from the United States and deported to Mexico.

SUSAN E. CASTRO
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Antonio, Texas

File No.: A 37 005 740 September 20, 2001

In the Matter of	)	
ARACELY ZAMORA-GARCIA	)	IN REMOVAL PROCEEDINGS
Respondent	)	

JUDGE FOR THE RECORD

This is Immigration Judge Susan E. Castro, conducting a removal hearing on September 20, 2001 in San Antonio, Texas, in the matter of Aracely Zamora-Garcia, file 37 005 740. The Immigration Service is represented by Martha Buxton, Assistant District Counsel. The respondent is present and represented by Alberto Cruz, an accredited representative. The contract interpreter in the Spanish language is Joe Alva Gonzalez.

JUDGE TO MR. GONZALEZ

Please raise your right hand and I'll place you under the interpreter's oath? Do you solemnly swear that you will translate or interpret from Spanish to English and English to Spanish truly and accurately to the best of your ability?

MR. GONZALEZ TO JUDGE

I do, Your Honor.

JUDGE TO MR. GONZALEZ

Thank you.

JUDGE FOR THE RECORD

We are here to consider the respondent's request for cancellation of removal. I have the Notice to Appear as Exhibit Number 1 and the – well, there is a I-261 entered as Exhibit 2. I neglected to note it on my document for some reason. Exhibit 3 is the Service documents that were submitted, the I-213 and the affidavit.

JUDGE TO MS. BUXTON

Do you reflect that the I-261 was Exhibit 2?

MS. BUXTON TO JUDGE

Yes, Your Honor.

MR. CRUZ TO JUDGE

Your Honor, I was to be served with a copy.

JUDGE TO MR. CRUZ

Well, it was received in Court on May 9 in last year on the Laredo docket.

MS. BUXTON TO MR. CRUZ

It looks like this.

JUDGE TO MR. CRUZ

It was entered into the record, so you must have received it. Otherwise, it wouldn't have been entered in the record.

MR. CRUZ TO JUDGE

Yes, we have the I-261.

JUDGE TO MR. CRUZ

That's Exhibit 2. Exhibit 3 had a blue, my copy, the cover was blue and it had the Service authentication. Then, they had the I-261 which was – strike that – the I-213 which was two pages and the affidavit from the respondent which was three pages.

MS. BUXTON TO JUDGE

The I-213.

MR. CRUZ TO JUDGE

This one.

JUDGE TO MR. CRUZ

No.

MS. BUXTON TO JUDGE

Judge, let the record reflect that I have provided another copy of Exhibit 3 to Mr. Cruz.

JUDGE TO MS. BUXTON

All right.

JUDGE TO MR. CRUZ

And it was already entered into the record, so you would have stated no objection, Mr. Cruz, to the documents.

MR. CRUZ TO JUDGE

I do have the April 11th hearing.

JUDGE TO MR. CRUZ

Yes. And we took all the pleadings. The respondent admitted and conceded.

JUDGE FOR THE RECORD

The only other documents that I've received since that time are the application and the attached documents which were filed on September 17th.

MS. BUXTON TO JUDGE

The Service has a copy and would object to their being admitted into evidence in that they are untimely. We ask that you pretermit the relief. The due dates for the application was due by September 4th and all supporting documents 2001. The Service also received a copy on September 17.

JUDGE TO MR. CRUZ

Mr. Cruz.

MR. CRUZ TO JUDGE

Well, I do – they were filed late, Judge. The only reason that I state was because I was trying to make the respondent to get all the information for the application, to review everything. And we hadn't been able to. She called my office and her – had moved. I wasn't able to talk to her.

JUDGE TO MR. CRUZ

It was feed by the Service on August 28th.

MR. CRUZ TO JUDGE

Yes.

JUDGE TO MR. CRUZ

I don't see any reason why it couldn't have been filed with the Court shortly thereafter. It's nothing like waiting until the last minute to try to coordinate with your client. It would seem to me that as soon as the individual hearing was set, you would start getting all the information together, not wait until the last minute. The respondent has a lot to lose. She's been here since she was like 10.

MS. BUXTON TO JUDGE

Judge, again, we request that you deem the application abandoned.

JUDGE TO MR. CRUZ

I really don't see your excuse as adequate, Mr. Cruz. You did not even submit a request for extension of time to file that I have in my file anyway. Did you submit one?

JUDGE TO MS. ZAMORA-GARCIA

Q. Ms. Zamora.

A. Yes.

Q. Your application was not filed timely.

JUDGE FOR THE RECORD

We have this in English.

JUDGE TO MS. ZAMORA-GARCIA

Q. You speak English.

A. Yes.

Q. I would expect since you've been here since you were 10 roughly or 11 that you would speak English. I set

a deadline for the submission of the application at September 4th. The application was not filed until September 17th. That means it's late. The Government is asking me not to consider your application because it was filed late. The fee was paid to the Immigration Service on August 28th. It's on the application as feed in at that time. I am going to deem it abandoned because the explanation Mr. Cruz gave me that you were having problems communicating is not an adequate excuse for filing the application late. The last hearing prior to this one was April 11th. You had four months roughly to get the application in and filed and it wasn't. I'm deeming it abandoned which means that I'm not going to consider an application. I will enter it as identification purposes as Exhibit 4. Since that was the only application for relief that was requested and it has been considered abandoned, I am going to order you deported which means you're going to lose your permanent resident status and not be able to return to this country illegally [sic]. Do you understand?

A. Yes.

Q. To the extent that you have any problem with the fact that Mr. Cruz did not file your application by the deadline, I can only suggest that you consult with another attorney about or with an attorney about that. Do you understand?

A. Yes.

Q. I am going to dictate a formal decision and then I'll give you what's called a summary of oral decision and I'll explain about appeal. Do you understand?

A. Yes.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE RENDERS ORAL DECISION

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MS. ZAMORA-GARCIA

Q. The summary of oral decision that I'll be giving you and Mr. Cruz simply indicates that your application for cancellation of removal was denied. I'll make a note for late filing and that I've ordered you removed from the United States to Mexico. Do you understand? Do you understand?

A. Could I appeal?

Q. Yes. You can certainly. You do have the rights to appeal this decision to the higher Court through Mr. Cruz or through someone else. And in one second, I'll give you the appeal deadline. If you want to take appeal papers today, you can do that. I'll show you where they are.

JUDGE TO MS. BUXTON

Ms. Buxton, did the Service want to reserve any issue?

MS. BUXTON TO JUDGE

Waive, Your Honor.

JUDGE TO MS. BUXTON

Okay.

JUDGE TO MS. ZAMORA-GARCIA

Q. The appeal deadline is October 22nd. Now, the appeal has to reach the higher Court which is in Falls Church, Virginia by that date. If it gets there late, your appeal is going to be rejected. Okay. You must send the Government attorney a copy of the appeal papers and you must make sure you fill them out completely, put down all the reasons why you disagree with the decision. If you need to attach additional pages for that, you are free to do that as well. Having an attorney or an accredited representative doesn't get you extension. There is no extension on the appeal deadline. You have the 30 days and that's it. Okay. Do you have any questions?

A. What time, the October 22nd?

Q. It's October 22nd. You'll get a copy of this. I've written it down here at the bottom so you don't forget. Since it goes through the mail, that means don't wait until the last minute to file the appeal to make sure that it does get there in time. Once an appeal is filed, then what will happen is all the previous hearings, the hearing today, the decision will be typed into the written form called the transcript. That goes to you or your attorney, to the Government attorney, to the higher Court. They will review the transcripts. They will review the documents. They will review the decision. They will either agree with the decision I've made today. They can disagree with the decision and issue a new decision. Or they can decide that your case should come back to Court for some reason. It can take the higher Court several months, even sometimes several years to decide on an appeal. The important thing for you to remember is that you need to remember is that you need to continue to report any changes on your address

to the Court, to the Immigration Service, and if you have a representative on your appeal especially to that person since they will be the ones that will be contacted by the higher Court.

A. Yes.

Q. Is your correct address right now Route 2, Box 106, NA?

A. That is abbreviated for New Alton.

Q. New Alton. Is that Mission, Texas?

A. Yes.

Q. Okay. Is NA okay to put on the –

A. Yes.

Q. – correspondence?

A. Yes.

Q. Okay. All right.

JUDGE TO MR. CRUZ

Anything else, Mr. Cruz?

MR. CRUZ TO JUDGE

Nothing further.

JUDGE TO MS. BUXTON

Ms. Buxton?

MS. BUXTON TO JUDGE

Nothing further, Your Honor.

JUDGE TO MS. BUXTON

All right.

JUDGE FOR THE RECORD

The hearing is closed. We are off the record.

HEARING CLOSED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60255

ARACELY ZAMORA-GARCIA

Petitioner

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 2, 2006)

(Opinion 01/05/06, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

8 C.F.R. §287.3 Disposition of cases of aliens arrested without warrant.

. . .

(c) Notifications and information. Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized under § 292.2 of this chapter or 8 CFR 1292.2 that are located in the district where the hearing will be held. The examining officer shall note on Form I-862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

---

8 C.F.R. §1003.61 List.

(a) The Chief Immigration Judge shall maintain a current list of organizations and attorneys qualified under this subpart which provide free legal services. This list, which shall be updated not less than quarterly, shall be provided to aliens in immigration proceedings. The Chief Immigration Judge may designate an employee or employees to carry out his or her responsibilities under this subpart. Organizations and attorneys may be included on the list of free legal services providers if they qualify under one of the following categories:

(1) Organizations recognized under § 1292.2 of this chapter that meet the qualifications set forth in § 1003.62(a) and whose representatives, if any, are authorized to practice before the Board and Immigration Courts;

(2) Organizations not recognized under § 1292.2 of this chapter that meet the qualifications set forth in § 1003.62(b);

(3) Bar associations that meet the qualifications set forth in § 1003.62(c); and

(4) Attorneys, as defined in § 1001.1(f) of this chapter, who meet the qualifications set forth in § 1003.62(d).

(b) The listing of an organization qualified under this subpart is not equivalent to recognition under §292.2 of this chapter.

---

8 C.F.R. §1003.62 Qualifications.

(a) Organizations recognized under § 1292.2. An organization that is recognized under § 1292.2 of this chapter that seeks to have its name appear on the list of free legal services providers maintained by the Chief Immigration Judge must have on its staff:

(1) An attorney, as defined in § 1001.1(f) of this chapter; or

(2) At least one accredited representative, as defined in § 1292.1(a) (4) of this chapter, who is authorized to practice before the Board and Immigration Courts.

---

8 C.F.R. §1003.101 General provisions.

(a) Authority to sanction. An adjudicating official or the Board of Immigration Appeals (the Board) may impose

disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so. It will be in the public interest to impose disciplinary sanctions against a practitioner who is authorized to practice before the Board and the Immigration Courts when such person has engaged in criminal, unethical, or unprofessional conduct, or in frivolous behavior, as set forth in § 1003.102. . . .

---

8 C.F.R. §1003.102 Grounds.

It is deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any practitioner who falls within one or more of the categories enumerated in this section, but these categories do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest. Nothing in this regulation should be read to denigrate the practitioners duty to represent zealously his or her client within the bounds of the law. A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she:

. . .

(k) Engages in conduct that constitutes ineffective assistance of counsel, as previously determined in a finding by the Board or an Immigration Judge in an immigration proceeding, and a disciplinary complaint is filed within one year of the finding.

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8 C.F.R. §1292.2 Organizations qualified for recognition; requests for recognition; withdrawal of recognition; accreditation of representatives; roster

(a) Qualifications of organizations. A non-profit religious, charitable, social service, or similar organization established in the United States and recognized as such by the Board may designate a representative or representatives to practice before the Service alone or the Service and the Board (including practice before the Immigration Court). Such organization must establish to the satisfaction of the Board that:

(1) It makes only nominal charges and assesses no excessive membership dues for persons given assistance; and

(2) It has at its disposal adequate knowledge, information and experience.

(b) Requests for recognition. An organization having the qualifications prescribed in paragraph (a) of this section may file an application for recognition on a Form G-27 directly with the Board, along with proof of service of a copy of the application on the district director having jurisdiction over the area in which the organization is located. The district director, within 30 days from the date of service, shall forward to the Board a recommendation for approval or disapproval of the application and the reasons therefor, or request a specified period of time in which to conduct an investigation or otherwise obtain relevant information regarding the applicant. The district director shall include proof of service of a copy of such recommendation or request on the organization. The organization shall have 30 days in which to file a response with the Board to a recommendation by a district director

that is other than favorable, along with proof of service of a copy of such response on the district director. If the Board approves a request for time to conduct an investigation, or in its discretion remands the application to the district director for further information, the organization shall be advised of the time granted for such purpose. The Service shall promptly forward the results of any investigation or inquiry to the Board, along with its recommendations for approval or disapproval and the reasons therefor, and proof of service of a copy of the submission on the organization. The organization shall have 30 days from the date of such service to file a response with the Board to any matters raised therein, with proof of service of a copy of the response on the district director. Requests for extensions of filing times must be submitted in writing with the reasons therefor and may be granted by the Board in its discretion. Oral argument may be heard before the Board in its discretion at such date and time as the Board may direct. The organization and Service shall be informed by the Board of the action taken regarding an application. Any recognized organization shall promptly notify the Board of any changes in its name, address, or public telephone number.

. . .

(d) Accreditation of representatives. An organization recognized by the Board under paragraph (b) of this section may apply for accreditation of persons of good moral character as its representatives. An organization may apply to have a representative accredited to practice before the Service alone or the Service and the Board (including practice before immigration judges). An application for accreditation shall fully set forth the nature and extent of the proposed representative's experience and

knowledge of immigration and naturalization law and procedure and the category of accreditation sought. No individual may submit an application on his or her own behalf. An application shall be filed directly with the Board, along with proof of service of a copy of the application on the district director having jurisdiction over the area in which the requesting organization is located. The district director, within 30 days from the date of service, shall forward to the Board a recommendation for approval or disapproval of the application and the reasons therefor, or request a specified period of time in which to conduct an investigation or otherwise obtain relevant information regarding the applicant. The district director shall include proof of service of a copy of such recommendation or request on the organization. The organization shall have 30 days in which to file a response with the Board to a recommendation by a district director that is other than favorable, with proof of service of a copy of such response on the district director. If the Board approves a request for time to conduct an investigation, or in its discretion remands the application to the district director for further information, the organization shall be advised of the time granted for such purpose. The district director shall promptly forward the results of any investigation or inquiry to the Board, along with a recommendation for approval or disapproval and the reasons therefor, and proof of service of a copy of the submission on the organization. The organization shall have 30 days from the date of service to file a response with the Board to any matters raised therein, with proof or service of a copy of the response on the district director. Requests for extensions of filing times must be submitted in writing with the reasons therefor and may be granted by the Board in its discretion. Oral argument may be heard before the Board in its

discretion at such date and time as the Board may direct. The Board may approve or disapprove an application in whole or in part and shall inform the organization and the district director of the action taken with regard to an application. The accreditation of a representative shall be valid for a period of three years only; however, the accreditation shall remain valid pending Board consideration of an application for renewal of accreditation if the application is filed at least 60 days before the third anniversary of the date of the Board's prior accreditation of the representative. Accreditation terminates when the Board's recognition of the organization ceases for any reason or when the representative's employment or other connection with the organization ceases. The organization shall promptly notify the Board of such changes.

Form 1-215B
(Rev. 9-1-72(Y)

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

RECORD OF SWORN STATEMENT
IN AFFIDAVIT FORM

AFFIDAVIT

IN RE: ZAMORA-Garcia, Aracely **FILE NO.** A 37 005 740

EXECUTED AT Valley International Airport

DATE February 10, 2000

Before the following officer of the U.S. Immigration and Naturalization Service: Mari Gutierrez

in the English language. Interpreter _____ used.

I, Aracely ZAMORA-Garcia, acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement regarding assisting the illegal entry of Ruth Nino-Cruz and Aracely Bello-Cruz.

He has told me that my statement must be freely and voluntarily given and has advised me of these rights:

> "You have the right to remain silent.
> Anything you say can be used against you in court, or in any immigration or administrative proceedings.

> You have the right to talk to a lawyer for advice before we ask you any questions and to have hint with you during questioning.
> If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer?

I am willing to make a statement without anyone else being present. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement:

Q: DO YOU THE NAME, NICKNAME, ADDRESS OR TELEPHONE NUMBER OF ANY PERSONS RELATED WITH THE JUVENILES?

A: NICOLAS NINO MADE ARRANGEMENTS WITH ME. I ONLY HAVE HIS PHONE NUMBER (812) 579-6751. HE'S THE FATHER OF THE GIRLS.

Q: DID HE PAY YOU FOR THE TRIP?

A. YES, HE GAVE ME $1,000.00 FOR THE TRIP.

Q: WHAT ARRANGEMENTS WERE MADE WITH YOU TO BRING THE GIRLS INTO THE UNITED STATES?

A: ON TUESDAY, FEBRUARY 8TH, MY COUSIN ENRIQUE TOLD ME THAT THERE WAS A MAN WHO NEEDED HELP BRINGING HIS CHILDREN TO THE UNITED STATES AND SINCE I WASN'T WORKING I COULD HELP HIM. MY COUSIN TOOK ME TO HIS TRAILER (#24) AND WE MADE ARRANGEMENTS. HE TOLD ME THAT HE WOULD ARRANGE FOR HIS

DAUGHTERS TO BE FLOWN FROM CUERNAVACA TO REYNOSA AND THEN TO A HOTEL. WHERE I WOULD GO TO PICK THEM UP. WEDNESDAY MORNING, HE CAME TO MY TRAILER AND TOLD ME THAT THEY WERE ON THEIR WAY TO REYNOSA. HE THEN GAVE ME $1,000.00 FOR THE TRIP. I ARRIVED IN HARLINGEN, TEXAS AT APPROXIMATELY 3:00PM THAT SAME DAY. I CALLED MY FRIEND (GONZALO ROMERO) AND HE PICKED ME UP. WE WENT STRAIGHT TO REYNOSA IN HIS CAR I WENT TO THE SAN CARLOS HOTEL AND ASKED FOR JOSE INEZ (THE GIRLS GRANDFATHER). THE PEOPLE AT THE DESK TOLD ME THAT HE WAS IN ROOM 201. I WENT THERE AND MET WITH JOSE INEZ. HE TOLD THE GIRLS THAT THEY WOULD BE LEAVING WITH ME AND WE LEFT. WE GOT IN MY FRIENDS CAR AND WE HEADED TO THE BRIDGE. AT THE BRIDGE, I TOLD MY FRIEND THAT I WAS GOING TO GET OFF THE CAR AND WALK WITH THE GIRLS TO THE UNITED STATES. I THEN TOLD HIM TO PICK ME UP IN HIDALGO AT A STORE CALLED MELROSE.

I SHOWED MY RESIDENT ALIEN CARD TO THE IMMIGRATION OFFICERS AND THEY WAVED ME THROUGH. I HAD WITH ME A BIRTH CERTIFICATE BELONGING TO MY COUSIN AND THOUGHT THAT I WOULD USE IT IF THEY ASKED ME TO SHOW PAPERS FOR THE GIRLS. MY FRIEND PICKED US UP AT MELROSE AND TOOK US TO A HOTEL IN ALAMO AND ME AND THE GIRLS REMAINED THERE UNTIL THIS MORNING WHEN GONZALO PICKED US UP AGAIN. HE BROUGHT US TO THE AIRPORT. I WAS TOLD BY THE GIRLS FATHER TO CALL HIM WHEN I

ARRIVED IN INDIANA SO THAT HE COULD PICK US UP AT THE AIRPORT.

I have read (or have had read to me) the foregoing statement, consisting of 1 pages. I state that the answers made therein by me are true and correct to the best of my knowledge and belief and that this statement is a full, true, and correct record of my interrogation on the date indicated by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement [and the correction(s) noted an page(s) 1].

Signature /s/ Aracely Zamora

Subscribed and sworn to before me at United States Border Patrol Station Harlingen, Texas on February 10, 2000

/s/ Mari Gutierrez
Officer, United States Immigration
and Naturalization Service
Border Patrol Agent

Witnessed by: JAIME CRESPO /s/ Jaime Crespo
Border Patrol Agent

RECORD OF SWORN STATEMENT

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Form I-263A (Rev. 11-20-63)

OMB #1125-0001

U.S. Department of Justice
Executive Office for
Immigration Review

Application for Cancellation of Removal For Certain Permanent Residents
(Under Section 240A of the Immigration and Nationality Act)

PLEASE READ ADVICE AND INSTRUCTIONS BEFORE FILLING IN FORM **PLEASE TYPE OR PRINT**	**Fee Stamp** S678 001 002 08/28/01 11:18 Appeal EOIR 100.00

PART 1 – INFORMATION ABOUT YOURSELF

1) My present true name is: (*Last, First, Middle*)
Zamora-Garcia, Aracely

2) Alien Registration Number: A37 005 740

3) My name given at birth was: (*Last, First, Middle*)
Zamora-Garcia, Aracely

4) Birth Place: (*City, Country*) Reynosa, Mexico

5) Date of Birth: (*Month, Day, Year*) 10-27-73

6) Gender: ☐ Male ☒ Female

7) Height: 4'11"

8) Hair Color: Brown

9) Eye Color: Brown

10) Current Nationality & Citizenship: Mexican

11) Social Security Number: 453-57-9582

12) Home Phone Number: (956) 585-9087

13) Work Phone Number: ( )

14) I currently reside at:

Rt. 2 Box 106
Apt. number and/or in care of

Number and Street

Mission, TX 78572
City or Town *State* *ZIP Code*

15) I have been known by these additional name(s):

None

16) I have resided in the following locations in the United States: (List PRESENT ADDRESS FIRST, and work back in time for at least 7 years.)

Street and Number – Apt. or Room # – City or Town – State – ZIP Code	Resided From: (*Month, Day, Year*)	Resided To: (*Month, Day, Year*)
Rt. 2. Box 106, Mission, TX 78572	May 2000	PRESENT
c/o U.S. INS Loredo Processing Center Laredo, TX	Mar. 2000	May 2000
Cameron County Jail Brownsville, TX	Feb. 2000	Mar. 2000
Route 2 Box 106, Mission, TX 78572	Mar. 1982	Feb. 2000

PART 2 - INFORMATION ABOUT THIS APPLICATION

17) I, the undersigned, hereby request that my removal be cancelled under the provisions of section 240A(a) of the Immigration and Nationality Act (INA). I believe

that I am eligible for this relief because I have been a lawful permanent resident alien for 5 or more years, have 7 years of continuous residence in the United States, and have not been convicted of an aggravated felony. I was admitted as or adjusted to the status of an alien lawfully admitted for permanent residence on Mar. 18, 1982 (*date*) at Hidalgo, TX (*place*).

(Received Sept. 17, 2001, 1:39 p.m. Houston, TX)

[I.D. only, Exh. 4, /s/ SC 9/20/01]

PART 3 – INFORMATION ABOUT YOUR PRESENCE IN THE UNITED STATES

18) My first arrival into the United States was under the name of: (*Last, First, Middle*) Zamora-Garcia, Aracely

19) My first arrival to the United States was on: (*Month, Day, Year*) Approx. 1977 or 1978

20) Place or port of first arrival: (*Place or Port, City, and State*) Hidalgo, Texas

21) I: ☐ was admitted as a lawful permanent resident.

☐ was admitted as a nonimmigrant. Specify visa type: _____.

☐ entered without inspection.

☐ other – specify _____.

22) If admitted as a nonimmigrant, period for which admitted: (*Month, Day, Year*) N/A

23) My last extension of stay in the United States expired on: (*Month, Day, Year*) N/A

24) Since the date of my first arrival, I departed from and returned to the United States at the following places and on the following dates: (*please list all departures*

regardless of how briefly you were absent from the United States)

If you have never departed from the United States since your original date of arrival, please mark an X in this box: ☐

1	Port of Departure (*Place or Port, City and State*) Hidalgo, TX	Departure Date (*Month, Day, Year*) 3-16-82	Purpose of Travel visit	Destination Mexico
	Port of Return (*Place or Port, City and State*) Hidalgo, TX	Return Date (*Month, Day, Year*) 3-18-82	Manner of Return International Bridge	Inspected & Admitted? ☒ Yes ☐ No
2	Port of Departure (*Place or Port, City and State*)	Departure Date (*Month, Day, Year*)	Purpose of Travel	Destination
	Since my admission for lawful permanent residence on 3-18-82			
	Port of Return (*Place or Port, City and State*)	Return Date (*Month, Day, Year*)	Manner of Return	Inspected & Admitted? ☒ Yes ☐ No
	I have made one day visits to Mexico via Hidalgo, TX 10 to 12 times per year; my last visit was on 2-8-00 returning on 2-9-00.			

25) Have you ever departed the United States:

a) under an order of deportation, exclusion or removal? . . . . . ☐ Yes ☒ No

b) pursuant to a grant of voluntary departure?

. . . . . ☐ Yes ☒ No

PART 4 – INFORMATION ABOUT YOUR MARITAL STATUS AND SPOUSE

26) I am not married: ☒

I am married: ☐

27) If married, the name of my spouse is: (*Last, First, Middle*) N/A

28) Date of marriage: (*Month, Day, Year*) N/A

29) The marriage took place in: (*City and Country*) N/A

30) Birth place of spouse: (*City and Country*) N/A

31) My spouse currently resides at: N/A

_____

Apt. number and/or in care of

_____

Number and Street

_____

City or Town State/Country ZIP Code

32) Birth date of spouse: (*Month, Day, Year*) N/A

33) My spouse is a citizen of: (*Country*) N/A

34) If your spouse is other than a native born United States citizen, answer the following:

He/she arrived in the United States at: (*City and State*) N/A_____.

He/she arrived in the United States on: (*Month, Day, Year*) N/A_____.

His/her alien registration number is: A# N/A_____.

He/she was naturalized on (*Month, Day, Year*) _____ at _____(*City and State*).

35) My spouse ☐ – is ☐ – is not employed. If employed, please give salary and the name and address of the place(s) of employment.

Full Name and Address of Employer N/A	Earnings Per Week (*Approximate*)
	$
	$
	$

PART 4 - INFORMATION ABOUT YOUR MARITAL STATUS AND SPOUSE

36) I ☐ have ☒ have not been previously married: (*If previously married, list the name of each prior spouse, the dates on which each marriage began and ended, the place where the marriage terminated, and describe how each marriage ended.*)

Name of Prior Spouse: (*Last, First, Middle*)	Date marriage began: Date marriage ended:	Place marriage ended: (*City and Country*)	Description or manner of how marriage was terminated or ended:
	_____	_____	_____

Name of Prior Spouse: (*Last, First, Middle*)	Date marriage began: Date marriage ended:	Place marriage ended: (*City and Country*)	Description or manner of how marriage was terminated or ended:
	_____	_____	_____

37) Have you been ordered by any court, or are otherwise under any legal obligation, to provide child support and/or spousal maintenance as a result of a separation and/or divorce? ☐ Yes ☒ No

PART 5 – INFORMATION ABOUT YOUR EMPLOYMENT AND FINANCIAL STATUS

38) Since my arrival into the United States, I have been employed by the following – named persons or firms: (*Please begin with present employment and work back in time. Any periods of unemployment or school attendance should be specified.*)

Full Name and Address of Employer	Earnings Per Week (*Approximate*)	Type of Work Performed	Employed From: (*Month, Day, Year*)	Employed To: (*Month, Day, Year*)
Arturo Lozano 4404 Ashley Way Austin, TX	$ 398.00	Delivery Work	Dec. 2000	Mar. 2001 ~~PRESENT~~
Mike Hall 8417 N. 500 E. Seymour, IND 47271	$280.00	Farm Labor	Apr. to Sept. months yearly 1997 to 1999	
[Illegible] Imaginative Sight & Sound 3030 Barker Dr. Columbus, IND	$350.00	Assembly Work	6/5/00	Nov. 2000
CBI Austin, TX 47201	400.00	Class Rings Assembly Work	Feb. 1996	Feb. 1998

39) If self-employed, describe the nature of the business, the name of the business, its address, and net income derived therefrom:

N/A

40) My assets (and if married, my spouse's assets) in the United States and other countries, not including clothing and household necessities, are:

Self		**Jointly Owned with Spouse**	
Cash, Stocks, and Bonds.....	$100.00	Cash, Stocks, and Bonds	$
Real Estate.....	$ –	Real Estate.....	$
Automobile (value minus amount owed).....	$ –	Automobile (value minus amount owed)	$
Other (describe on line below).....	$ –	Other (describe on line below).....	$
TOTAL	$100.00	**TOTAL**	$

41) I ☐ have ☒ have not received public or private relief or assistance (e.g. Welfare, Unemployment Benefits, Medicaid, ADC, etc.). If you have, please give full details including the type of relief or assistance received, date for which relief or assistance was received, place, and amount received during this time:

42) Please list each of the years in which you have filed an income tax return with the Internal Revenue Service: every year from 1996 to 2000.

PART 6 – INFORMATION ABOUT YOUR FAMILY

43) I have None (*Number of*) children. Please list information for each child below, include assets and earnings

information for children over the age of sixteen who have separate incomes:

Name of Child: (*Last, First, Middle*) Child's Alien Registration Number:	Citizen of What Country: Birth Date: (*Month, Day, Year*)	Now Residing At: (*City and Country*) Birth Place: (*City and Country*)	Immigration Status of Child?
_____ A#:	_____	_____	
Estimated Total of Assets: $ _____		Estimated Average Weekly Earnings: $ _____	
_____ A#:	_____	_____	
Estimated Total of Assets: $ _____		Estimated Average Weekly Earnings: $ _____	
_____ A#:	_____	_____	
Estimated Total of Assets: $ _____		Estimated Average Weekly Earnings: $ _____	

44) If your application is denied, would your spouse and all of your children accompany you to your:

Country of Birth ☐ Yes ☐ No
Country of Nationality ☐ Yes ☐ No
Country of Last Residence ☐ Yes ☐ No

If you answered "NO" to any of the responses, please explain: N/A

45) Members of my family, including my spouse and/or child(ren) ☒ – have ☐ – have not received public or private relief or assistance (e.g., Unemployment Benefits, Welfare, Medicaid, ADC, etc.). If any member of

your immediate family has received such relief or assistance, please give full details including identity of person(s) receiving relief or assistance, dates for which relief or assistance was received, place, and amount received during this time: food stamps

46) Please give the requested information about your parents, brothers, sisters, aunts, uncles, and grandparents. As to residence, show street address, city, and state, if in the United States; otherwise show only country:

Name : (*Last, First, Middle*) Alien Registration Number:	Citizen of What Country: Birth Date: (*Month, Day, Year*)	Relationship to Me: Birth Place: (*City and Country*)	Immigration Status of Listed Relative
A#: 37 005 737	Mexico 9 / 8 / 49	Father Matamoros, Mexico	Lawful permanent resident
Complete Address of Current Residence: Route 2 Box 106 Mission, TX 78572			
A#: 37 005 738	Mexico 2 / 2 / 52	Mother Torreon, Mexico	Lawful permanent resident
Complete Address of Current Residence: Route 2 Box 106 Mission, TX 78572			
(See Attachment Sheet For Additional Information)			

PART 7 -MISCELLANEOUS INFORMATION

47) I ☐ – have ☒ – have not entered the United States as a crewman after June 30, 1964.

48) I ☐ – have ☒ – have not been admitted as, or after arrival in the United States acquired the status of, an exchange alien.

49) I ☐ – have ☒ – have not submitted address reports as required by section 265 of the Immigration and nationality Act.

50) I ☒ – have ☐ – have never (either in the United States or in any foreign country) been arrested, summoned into court as a defendant, convicted, fined, imprisoned, placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public law or ordinance (including, but not limited to, traffic violations or driving incidents involving alcohol). (*If answer is in the affirmative, please give a brief description of each offense including the name and location of the offense, date of conviction any penalty imposed, any sentence imposed, and the time actually served*). Feb. 9, 2000 Harlingen TX convicted of aiding and abetting 2 aliens to enter the United States in violation of law; served between 30 to 40 days of 60 days sentence; no probation period given.

51) Have you ever served in the Armed Forces of the United States? ☐ – Yes ☒ – No. If "Yes", please state branch (*Army, Navy, etc.*) and service number. _____.

Place of entry on duty: (*City and State*) _____.

Date of entry on duty: (*Month, Day, Year*) _____.

Date of discharge: (*Month, Day, Year*) _____.

Type of discharge (*Honorable, Dishonorable, etc.*) ___.

I served in active duty status from:
(*Month, Day, Year*) ____ to (*Month, Day, Year*) ____.

52) Have you ever left the United States or the jurisdiction of the district where you registered for the draft to avoid being drafted into the military or naval forces of the United States? ☐ Yes ☒ No

53) Have you ever deserted from the military or naval forces of the United States while the United States was at war? ☐ Yes ☒ No

54) If male, did you register under the Selective Service (Draft) Law of 1917, 1918, 1948, 1951, or later Draft Laws? ☐ Yes ☒ No

If "Yes," please give date, Selective Service number, local draft board number, and your last draft classification: _____

55) Were you ever exempted from service because of conscientious objection, alienate, or any other reason? ☐ Yes ☒ No

56) Please list your present or past membership in or affiliation with every political organization, association, fund, foundation, party, club, society, or similar group in the United States or any other place since your 16th birthday. Include any foreign military service in this part. If none, write "NONE." Include the name of the organization, location, nature of the organization, and the dates of membership.

Name of Organization	Location of Organization	Nature of Organization	Member From: (*Month, Day, Year*)	Member To: (*Month, Day, Year*)
None				

57) Have you ever:

☐ Yes ☒ No been ordered deported or removed?

☐ Yes ☒ No overstayed a grant of voluntary departure from an Immigration Judge or the Immigration and Naturalization Service (INS)?

☐ Yes ☒ No failed to appear for deportation or removal?

58) Have you ever been:

☐ Yes ☒ No a habitual drinker?

☐ Yes ☒ No one whose income is derived principally from illegal gambling?

☐ Yes ☒ No one who has given false testimony for the purpose of obtaining immigration benefits?

☐ Yes ☒ No engaged in prostitution or unlawful commercialized vice?

☐ Yes ☒ No involved in a serious criminal offense and asserted immunity from prosecution?

☐ Yes ☒ No a polygamist?

☒ Yes ☐ No one who aided and/or abetted another to enter the United States illegally?

☐ Yes ☒ No a trafficker of a controlled substance, or a knowing assister, abettor, conspirator, a colluder with others in any such controlled substance offense (not including a single offense of simple possession of 30 grams or less of marijuana)?

☐ Yes ☒ No inadmissible or deportable on security-related grounds under sections 212(a)(3) or 237(a)(4) of the INA?

☐ Yes ☒ No one who has ordered, incited, assisted, or otherwise participated in the persecution of an individual on account of his or her race, religion, nationality, membership in a particular social group, or political opinion?

☐ Yes ☒ No a person previously granted relief under sections 212(c) or 244(a) of the INA or whose removal has previously been cancelled under section 240A of the INA?

59) The following certificates or other supporting documents are attached hereto as a part of this application: (*Refer to the Instruction Sheet for documents which **should be attached***).

- Front copy of I-551's of Applicant's parents – Elise Zamora-Loa & Juana Garcia de Zamora
- Copies of birth certificates of Applicant's siblings – Jose Angel Zamora, Eduardo Zamora, Noelia Zamora and Norma Zamora
- Copies of Applicant's income tax returns for 1999 and 2000

APPLICATION NOT TO BE SIGNED BELOW UNTIL APPLICANT APPEARS BEFORE AN IMMIGRATION JUDGE

I do swear (affirm) that the contents of the above application, including the documents attached hereto, are true to the best of my knowledge and that this application is now signed by me with my full, true name.

_____

(Complete and true signature of applicant or parent or guardian)

Subscribed and sworn to before me by the above-named applicant at _____

_____

Immigration Judge

_____

Date: (Month, Day, Year)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was: ☒ – delivered in person, ☐ – mailed first class, postage prepaid on Sept. 17, 2001 (*Month, Day, Year*) to INS District Counsel Office at 8940 Fourwinds Dr. Room 5045 San Antonio, TX 78239 (*INS District Counsel and Address*)

/s/ Alberto Cruz

Signature of Applicant (or attorney or representative)

ATTACHMENT TO FORM 01R-42A
RE: ZAMORA-GARCIA, ARACELY
File No. A 37 005 740

ADDITIONAL INFORMATION

PART 6. INFORMATION ABOUT YOUR FAMILY page 4

46) NAME: Citizen of What Country:
Alien Registration Number Birth Date:

Relationship: Immigration
Birth Place: Status:

Address:

Eliseo Zamora-Garcia, Jr. A 37 005 739 brother Reynosa, Mexico	Resident	Mexico 7-11-71 Lawful permanent Resides in Mission, TX
Jose Angel Zamora N/A brother Mission, TX U.S.A. Rt. 2 Box 106 Mission, TX 78572		U.S.A. 10-1-75 U.S. citizen
Eduardo Zamora N/A brother Weslaco, TX. U.S.A.	U.S.A. 10-13-77 U.S. Citizen	Rt. 2 Box 106 Mission, TX 78572
Noelia Zamora N/A sister Hidalgo, TX U.S.A. P.O. Box 732 Pharr, TX		U.S.A. 9-11-79 U.S. Citizen
Cristina Zamora N/A sister Tampa, Florida U.S.A. 506 Cypress Mission, TX		U.S.A. 4-22-81 U.S. Citizen

Juanita Zamora			
N/A		U.S.A.	
sister		4-22-81	Rt. 2 Box 106
Tampa, Florida, U.S.A.	U.S. Citizen		Mission, TX 78572
Norma Zamora			
N/A sister		U.S.A.	Rt. 2 Box 106
Ionia, Michigan U.S.A.			Mission, TX 78572
		8-23-83	U.S. Citizen

INS
SAN ANTONIO, TX

08/28/01

0001

ZAMORA,A37005740 #

APPEAL EDIR 40

	100.00
SUBTTL	100.00
M-0	**100.00**

1 ITEMS

8678 001 002 11:18
THANK YOU

U.S. Department of Justice
Immigration and Naturalization Service

HRL #

Record of Deportable/Inadmissible Alien

CONTROL Name (Last, First, Middle)							Aliases
ZAMORA-Garcia, Aracely							
Birthdate	Age	Marital Status	File Number				Name of Last/Current U.S. Employer
10/27/1973	26	Single	A37 005 740				East Fork Growers
Sex	Hair	Eyes	Complexion	Height	Weight	Scars or Marks	Address of U.S. Employer
F	Brn.	Brn.	Medium	59"	175	N/V	Semore, Indiana
U.S. Address/Mail (Number) (Street) (City) (State) (Zip Code)							Type of Employment
Port Isabel Service Processing Center, Route 3 Box 341, Los Fresnos, TX. 78566							Laborer
Alien's Telephone #	Date of Action	Location Code	Salary	From: To:			
956-233-4431	2/10/2000	MCA/HRL	hr.	4/99 thru 9/99			
City, Province (State) and Country of Birth	Country of Citizenship	Passport Number and Country of Issue					
Reynosa, TAM. Mexico	**Mexicio**						
Date, Place, Time, and Manner of Last Entry/Attempted Entry	Status at Entry	Length of Time Illegally in U.S.	Status when Found				
February 9, 2000 at POE HID 2100	INAD	A/E	T/S				
Foreign Address/Residence (Number, Street, City, Province (State), Country	Arrived From/Boarded At						
90 N. National Rd #24, Columbus, Indiana 47201							
Method of Location/Apprehension	(At/Near)	Date & Hour	Apprehended by				
BP/TCA	Harlingen, Texas	02/10/00 6:00 a.m.	Gutierrez/Crespo				
Visa # _____ ☐ NIV ☐ IMM ☐ None	Date of Visa Iss./Loc.	Name on Social Security Card	Social Security No.				
Name, Address, and Nationality of Spouse (Maiden Name, if appropriate)	Number & Nationality of minor Children						
Father's Name, and Nationality and Address, If known	Mother's Present and Maiden Names, Nationality, and Address, if Known						
Eliso Mexican SAS	Juana Mexican SAS						
Monies Due/Property in U.S. Not in immediate possession	Record Checks Completed ☐ None ☐ Other (specify)	F.B.I. No.					
☒ None claimed ☐ See Form I-43	☒ CIS ☒ DACS ☒ NCIC ☒ NIIS ☐ OASIS ☐ STSC						
Deportation charge(s)	Exclusion Ground(s)						
237(a) (a) (1) (A) ; 237(a) ( ) ( ) ( ) ; 237(a) ( ) ( ) ( )	212(a) (6) (A) (1) ; 212(a) ( ) ( ) ( )						
Place a check on the appropriate box(es) if any of the following actions were completed:	DACS Citation(s)						
☐ Doc Lifted (No.) ☒ Fingerprinted ☒ Photographed 1-217 Executed	IGE						
Special Programs	Fraudulent Documents	Criminal Record ☐ Yes ☒ No	Immigration Record Ye No☒				
☐ Grandfathered Alien ☐ OCDETF ☐ Sanctions ☐ SAVE	☐ Sanctions ☐ Other	☐ CA ☐ CO ☐ SR ☐ AF	☐ Prior Deport ☐ Prior VR				
Smuggled Alien ☐ Claimed ☐ Verified ☐ Land ☐ Water ☐ Aircraft	Assistance in Apprehension ☐ Other Observation Device (specify) ☐ Sensors ☐ Observation Aircraft ☐ K-9 Patrol ☐ Horse Patrol ☐ All Terrain Vehicle						
Contraband: ☐ Currency ☐ Narcotics ☐ Weapons ☐ Other	Funds in Possession Alien Initial Date	A list of free legal services has been provided: ☒ Yes ☐ No (formal proceedings were not instituted)					
	48.00/65.00 /s/ AZ 2/10/2000						

App. 48

Alien has been advised of communication privileges pursuant to 8 CFR 242.2(g) MG initial 2/10/2000 Date

Narrative: Include details not shown above and whether or not eligible for special status program (e.g., TPS, etc.)

Subject was encountered at the Valley International Airport in Harlingen, Texas attempting to board a Southwest flight to Houston, Texas with a final destination to Indianapolis, IN. I, Border Patrol Agent Mari Gutierrez and Agent Jaime Crespo, were in the gate 5 (waiting area) performing airport duties when we observed this subject, later identified as ZAMORA-Garcia, Araceli, enter the area with 2 children (girls). ZAMORA was rushing up to the ticket counter with the children and was rushing the ticket agent for the boarding pass. All subjects were not in possession of any luggage (a common tactic used by illegal aliens). I approached subject, identified myself as an Immigration Officer and asked her to state her citizenship, ZAMORA stated that she was a resident alien and showed me her resident alien card (A37 005 740). I asked her about the children she was travelling with and she stated that they were her girls and only one was a United States citizen the other did not have any immigration documents. The girls were avoiding eye contact with me so I approached the younger girl, later identified as Ruth NINO-Cruz (7 years), and asked her where she was born and she stated from Mexico. I then approached the older child, later identified as Aracely BELLO-Cruz, and asked her where she was born and she stated she was born in Mexico. I then asked both children if the lady travelling with them was their mother or relative and both said "No" and that their mother was in Indiana. The older child (Aracely) stated that they were told to go with this lady and that she would take them to their mother. I approached ZAMORA

and asked her again what her relationship was to the children and she was now stating that she was their aunt and she handed me a wallet-sized birth certificate for the older child identifying her as Arely Aracely GARCIA-Torres born in Mission, Texas. All subjects were escorted to the INS Office, located in the airport for further investigation and processing.

/s/ M Gutierrez, BPA

DISTRIBUTION	Received (subject and documents) (report of interview) from
ORIG-FILE COPY-MCA/HRL Event # HRL20000200307 Ident 81744	Officer: Mari Gutierrez February 10, 2000 12:38 PM Disposition _____ Prosecutions (Receiving Officer) [Illegible]

(2)

No. 05-1519

FILED
AUG 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

ARACELY ZAMORA-GARCIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
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Attorneys
Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether petitioner suffered a deprivation of rights under the Due Process Clause when her request for discretionary relief from removal was deemed abandoned because petitioner's representative had not filed necessary documents in a timely fashion, and the Board of Immigration Appeals concluded that petitioner would have had little likelihood of success in light of her conviction for helping two aliens to enter this country illegally.

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In the Supreme Court of the United States

No. 05-1519

ARACELY ZAMORA-GARCIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is *reprinted in* 161 Fed. Appx. 397. The opinion of the Board of Immigration Appeals (Pet. App. 3) is unreported. The decision of the immigration judge (Pet. App. 4-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2006. A petition for rehearing was denied on March 2, 2006 (Pet. App. 17-18). The petition for a writ of certiorari was filed on May 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Alien smuggling—the act of assisting another person to enter the United States in violation of the immigration laws—is a criminal offense. See 8 U.S.C. 1324(a) (2000 & Supp. IV 2004). In addition, "[a]ny alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable." 8 U.S.C. 1227(a)(1)(E)(i). An alien who engages in such conduct also cannot be regarded as a "person of good moral character" for purposes of the immigration laws. See 8 U.S.C. 1101(f)(3) (2000 & Supp. IV 2004); 8 U.S.C. 1182(a)(6)(E).

Petitioner is a native of Mexico who obtained lawful permanent resident status in 1982. Pet. App. 4. She is a migrant farm worker whose "home base" is in the Rio Grande Valley in Texas. A.R. 53. Before the events that gave rise to this case, she traveled to Mexico approximately once a month. See Pet. App. 33.

At approximately 6 a.m. on February 10, 2000, petitioner was apprehended by border patrol agents at the Harlingen, Texas, airport, as she tried to obtain boarding passes for herself and two minor Mexican nationals for a flight to Indiana. Pet. App. 48-49. Petitioner initially claimed that the minors were her daughters. *Id.* at 49. After the girls stated that their mother was in Indiana, however, petitioner claimed that she was the girls' aunt and produced a United States citizen birth certificate, which she claimed was the older child's. *Id.* at 49-50.

A subsequent investigation revealed that the children had been driven from Cuernavaca, south of Mexico City, to Reynosa, Mexico, and had met petitioner at that location. Petitioner escorted the girls through the port of entry by showing her lawful-permanent-resident identification card. When questioned by immigration officials, petitioner first claimed that the older child had furnished the birth certificate; she then stated that the children's mother had given it to her; and she finally admitted that it belonged to her own cousin. Petitioner also stated that she was given $1000 for the trip. The children were turned over to the Mexican Consulate in Brownsville, Texas, and petitioner was referred for criminal prosecution and for removal proceedings. Petitioner later pleaded guilty to aiding and abetting aliens to elude examination by immigration inspectors, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2. A.R. 231; Pet. App. 40.

2. Petitioner's removal proceeding commenced on March 30, 2000. A.R. 247. Petitioner obtained representation by a non-attorney accredited representative. A.R. 181, 242; see Pet. App. 7. Petitioner conceded that she was subject to removal based on her alien-smuggling offense, see *id.* at 4-5; A.R. 183, and she indicated that she would apply for cancellation of her removal under 8 U.S.C. 1229b(a), see Pet. App. 5; A.R. 184.[1]

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[1] Section 1229b(a) provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.

On April 11, 2001, the immigration judge (IJ) scheduled a hearing on the request for discretionary relief for September 20, 2001. See A.R. 180, 185. The IJ informed petitioner that she was required to provide her fingerprints by April 30, 2001, and the application and supporting documents by September 4, 2001. See Pet. App. 5; A.R. 185. The IJ stated to petitioner: "You need to make sure that you cooperate fully with [your representative] because if you do not meet these deadlines, I will consider your application abandoned. I will not accept it late and I will order you deported." A.R. 186. Petitioner replied: "Okay." *Ibid.*

The IJ did not receive petitioner's application until September 17, 2001. See Pet. App. 5, 10. When the hearing reconvened on September 20, 2001, petitioner's representative acknowledged that the application and documents had been submitted after the deadline, and he stated that he had not been able to review the application with petitioner because she had moved and he was not able to talk with her when she called his office. *Id.* at 10. The IJ deemed the application abandoned, denied it on that basis, and ordered that petitioner be removed to Mexico. See *id.* at 6, 12.

3. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA or Board). Petitioner contended that the IJ had erred in ordering her removal, and that the IJ instead should have granted a continuance and referred petitioner's accredited representative for disciplinary proceedings. A.R. 59-61. In the alterna-

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8 U.S.C. 1229b(a). During the hearing, the Department of Homeland Security did not dispute that petitioner satisfied those eligibility requirements, but neither the immigration judge nor the Board of Immigration Appeals made any findings relating to petitioner's eligibility.

tive, petitioner contended that she had established the elements of an ineffective-assistance claim under *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), and that her case should therefore be remanded for a hearing on the merits of her request for cancellation of removal. A.R. 61-62. Petitioner stated that, in light of the equitable factors weighing in her favor, it was "highly likely that she would have earned discretionary relief [if she had been] given a hearing on the merits." A.R. 62.

On March 24, 2004, the BIA dismissed petitioner's appeal. Pet. App. 3. The Board noted petitioner's conviction for alien smuggling, and it observed that petitioner "presented no significant evidence that her equities outweigh this offense." *Ibid.* The BIA concluded that there was "little likelihood of success should the appeal be sustained," and it therefore dismissed the appeal. *Ibid.*

4. The court of appeals denied a petition for review. Pet. App. 1-2. The court rejected petitioner's contention that "the BIA and IJ had a duty to protect her from the alleged ineffectiveness of her accredited representative," finding the claim to be unsupported by any authority. *Id.* at 2. The court further held that, "[b]ecause [petitioner's] claim did not implicate the violation of a due process right, the BIA did not err in denying her claim for lack of prejudice." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Under established BIA precedent, a decision whether to grant or deny relief in the exercise of discre-

tion is made by balancing positive and negative factors bearing on the applicant's suitability for permanent residence in the United States. See, *e.g.*, *In re C-V-T-*, 22 I. & N. Dec. 7, 11-12 (B.I.A. 1998). The Board has also long held that, in order to obtain reopening of administrative proceedings or similar relief on the ground of ineffective assistance, an alien must demonstrate that he was prejudiced by his representative's substandard performance. See, *e.g.*, *Lozada*, 19 I. & N. at 640. Petitioner does not challenge the Board's authority to require a showing of prejudice in this setting, and any such challenge would be implausible. Even a defendant in a criminal trial, who is constitutionally entitled to the effective assistance of counsel, must demonstrate prejudice in order to obtain relief on an ineffective-assistance claim. See *Strickland* v. *Washington*, 466 U.S. 668, 693 (1984) (holding that, with limited exceptions, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice").

In the instant case, the BIA found that petitioner had "presented no significant evidence that her equities outweigh" her alien-smuggling offense. Pet. App. 3. For that reason, the Board concluded, petitioner "ha[d] not established that she was prejudiced by" the allegedly deficient representation because there was "little likelihood" that petitioner could ultimately succeed in her request for discretionary relief. *Ibid.* Even if petitioner could establish a constitutional right to effective assistance in connection with her application for cancellation of removal, there would be no basis for setting aside the BIA's decision in this case unless the Board's no-prejudice finding is overturned. Petitioner does not challenge that finding, however, and the BIA's assessment of the

competing equities in this case raises no issue warranting review by this Court, if that assessment is subject to judicial review at all.[2]

2. As the court of appeals correctly stated, petitioner's claim of ineffective assistance "did not implicate the violation of a due process right." Pet. App. 2. The ineffectiveness of a litigant's attorney cannot be the basis of a constitutional claim unless the litigant has a constitutional right to appointed counsel. See *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991) (holding that, because "[t]here is no constitutional right to an attorney in state post-conviction proceedings * * * , a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"); *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) (per curiam) ("Since respondent had no constitutional right to counsel [in a discretionary state appeal], he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely.").

Congress has provided that an alien in removal proceedings "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." 8 U.S.C. 1229a(b)(4)(A). Section 1229a(b)(4)(A) reflects Congress's understanding that

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[2] A discretionary "judgment regarding the granting of relief under" 8 U.S.C. 1229b is not subject to judicial review. 8 U.S.C. 1252(a)(2)(B)(i). That preclusion rule does not foreclose review of any "constitutional claims or questions of law." See REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106, 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)). The Board's assessment of the competing equities in this case implicates no constitutional or other legal question, but instead appears to reflect the sort of discretionary judgment that is unreviewable under Section 1252(a)(2)(B)(i).

aliens in those proceedings have no constitutional right to appointed counsel, and petitioner does not contend that her due process rights were violated by the government's failure to provide her an attorney. Thus, while the BIA has chosen to treat ineffective assistance of counsel as a ground for reopening prior administrative decisions under specified circumstances, that practice is not mandated by the Constitution. Although some courts of appeals have concluded that there is a due process right to effective assistance of counsel in removal proceedings, see, *e.g.*, *Dearinger ex rel. Volkova* v. *Reno*, 232 F.3d 1042, 1045-1046 (9th Cir. 2000), that conclusion is incorrect.[3]

The Court in *Torna* explained that the litigant in that case

> was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation—even if implicating a due process interest—was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive [the litigant] of due process of law.

455 U.S. at 588 n.4; see *Coleman*, 501 U.S. at 753 (holding that, in a context where a litigant has no constitutional right to appointed counsel, "the attorney is the [litigant's] agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear

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[3] The BIA, consistent with its usual practice of following circuit precedent, declined to find no due process right to effective assistance of counsel in *In re Assaad*, 23 I. & N. Dec. 553, 557-560 (2003).

the risk of attorney error") (internal quotation marks omitted).

The same analysis applies here. Absent any constitutional obligation on the part of the federal government to furnish petitioner with appointed counsel during her removal proceedings, any deficiency in her representative's performance cannot be attributed to the government for Fifth Amendment purposes. And, as in *Torna*, the IJ could not be said to have deprived petitioner of her rights under the Due Process Clause by treating her cancellation application as abandoned because it was filed late—particularly when the IJ had previously warned petitioner that an untimely filing would trigger precisely that consequence. See p. 4, *supra*. Rather, an alien in removal proceedings generally "must bear the risk of attorney error" (*Coleman*, 501 U.S. at 753) (internal quotation marks omitted), subject to such exceptions as Congress and the BIA choose to adopt in order to protect aliens from the consequences of substandard performance by counsel or non-attorney representatives in particularly egregious circumstances.

Petitioner argues (Pet. 7-8, 24) that the Attorney General's act of certifying non-attorneys and organizations as qualified to practice in removal proceedings "implicitly guarantee[s] their competence," and that the Attorney General therefore bears a measure of responsibility for the performance of those representatives. The court of appeals correctly rejected that claim, noting that it was unsupported by any authority. See Pet. App. 2. In order to establish a violation of the Due Process Clause, a litigant must show that "the party charged with the deprivation [is] * * * a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The "state action" requirement "avoids imposing on the

[government], its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936.

The government's willingness to allow a particular individual to represent aliens in removal proceedings is not a sufficient basis for imputing that person's conduct to the United States. The attorneys whose allegedly substandard performance was at issue in *Coleman* and *Torna* had presumably been deemed eligible to practice in the relevant state courts, yet this Court nevertheless held that those lawyers' errors could not provide the basis for a constitutional ineffective-assistance claim. Thus, because the United States is under no constitutional obligation to provide appointed counsel in removal proceedings, any errors committed by retained counsel or a non-attorney representative are not fairly attributable to the government. See *Torna*, 455 U.S. at 588 n.4 (explaining that the loss of Torna's right to seek Florida Supreme Court review "was caused by his counsel, and not by the State"). Although arbitrary conduct by an immigration judge or other federal adjudicator might under some circumstances effect a violation of the Due Process Clause, substandard performance by petitioner's representative cannot.

A departure from the principles announced in *Torna* and *Coleman* would be especially unwarranted in the immigration setting. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Congress has vested the Attorney General with broad discretion to cancel the removal of qualifying permanent residents, while also providing aliens with the opportunity to re-

tain counsel of their choice. See 8 U.S.C. 1158(d)(1) and (4), 1229a(b)(4)(A). The BIA has treated ineffective assistance of counsel as a ground for relief in certain circumstances but has established substantive and procedural requirements for aliens seeking to raise ineffective-assistance claims. Particularly in light of the deference this Court has consistently shown to decisions of the political Branches regarding the admission and removal of aliens, petitioner has no constitutional right to effective representation in removal proceedings.

3. Petitioner's Due Process Clause claim is especially misconceived in the circumstances of this case. Petitioner conceded from the outset that her alien-smuggling offense rendered her removable, and the proceedings before the IJ therefore focused solely on the question whether cancellation of removal was appropriate. See p. 3, *supra*. Because that discretionary decision implicated no constitutionally-protected liberty or property interest of petitioner's, she had no Due Process Clause rights of any sort in those proceedings, let alone a right to the effective assistance of a non-governmental representative.

Apart from any rights conferred by statute or regulation, a removable alien has no procedural or substantive rights relating to the Attorney General's decision whether to exercise discretion in his favor. Compare *Jay* v. *Boyd*, 351 U.S. 345, 358-361 (1956) (applicant has no right of access to confidential information considered by agency in deciding whether to exercise discretion when disclosure would be prejudicial to public interest, safety, or security), and *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), with *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-268 (1954) (ordering the district court to determine

whether the Attorney General had dictated BIA decision concerning discretionary relief, in contravention of governing regulations). Petitioner does not allege a violation of any pertinent statutory or regulatory requirement, and she conceded before the IJ that her alien-smuggling offense rendered her removable. See p. 3, *supra*. The statutory provision (8 U.S.C. 1229b) governing cancellation of removal imposes no substantive or procedural constraints on the "sound discretion of the Attorney General," *Jay*, 351 U.S. at 353, to determine which qualified aliens should be granted that relief.

Petitioner contends (Pet. 5-6) that her request for cancellation implicated both a liberty interest stemming from her desire to avoid removal from this country, and a property interest arising from the fee that she had paid for adjudication of the application and from her wish to continue to receive economic benefits by living and working in the United States. Those arguments are without merit. The fact that a particular government benefit would give the recipient greater freedom of movement or improve her financial condition does not mean that a constitutionally-protected liberty or property interest exists. Rather, the due process inquiry turns on whether applicable provisions of law create an *entitlement* to the benefit if specified conditions are met. See, *e.g.*, *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 466 (1981) (holding that inmate had no constitutionally-protected liberty interest in commutation of a prison sentence when applicable state law vested the Board of Pardons with "unfettered discretion"); *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract

need or desire for it. * * * He must, instead, have a legitimate claim of entitlement to it.").

Petitioner also contends (Pet. 1-2, 4-5, 11-19) that the courts of appeals have issued inconsistent pronouncements concerning the applicability of the Fifth Amendment to procedures used to adjudicate claims for discretionary relief from removal. Even assuming that some disuniformity exists in this area, petitioner has no substantial constitutional claim. Any due process right that petitioner might possess in connection with her application for discretionary relief does not include a right to effective representation. See pp. 7-11, *supra*. In any event, the BIA found that petitioner had not established prejudice from any deficiencies in her representative's performance. Because petitioner has not challenged that determination, she would not be entitled to relief even if she could prove the other elements of a Fifth Amendment claim. See pp. 5-7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

ARACELY ZAMORA-GARCIA,

Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY ISSUES PRESENTED

1) The primary issue presented herein is whether the Fifth Circuit erred in holding that even lawful permanent residents, ("LPRs"), under removal proceedings are not entitled to Due Process in the adjudication of applications for discretionary relief. This issue is not only of vital import, but contrary to Respondent's claim, (RESP:5),[1] Fifth Circuit precedent as applied herein conflicts with various decisions of this Court, including *Ex rel Accardi v. Shaughnessey,* 347 U.S. 260 (1954), and *Heikkila v. Barber*, 345 U.S. 229 (1953), and with precedent from several Courts of Appeals;

2) Neither the Board of Immigration Appeals, ("BIA"), nor any Circuit Court of Appeals, has adopted Respondent's claim under cases such as *Coleman v. Thompson,* 501 U.S. 722 (1991), that ineffective assistance of counsel cannot form the basis of a Due Process violation in deportation proceedings;[2]

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[1] Ms. Zamora's Petition for Certiorari is herein cited, by page, as (PET:___), and the Appendix, as (APP:___). The Brief for the Respondent in Opposition is similarly cited as (RESP:___).

[2] The terms "deportation" and "removal" proceedings are used interchangeably herein, since many of the cases cited were decided prior to the change in the nomenclature of the proceedings.

REPLY ISSUES PRESENTED – Continued

3) Ms. Zamora challenged the BIA's finding of "no prejudice" before the Fifth Circuit, but that Court did *not find against her* on the issue, so it is not ripe for consideration by this Court. To the extent that Respondent's challenge to Fifth Circuit precedent holding that a finding of "no prejudice" is subject to judicial review[3] is fairly raised by the issues presented herein, Ms. Zamora would show that it is reviewable as a mixed question of law and fact, and that, as argued before the Court of Appeals, the BIA erred herein both as a matter of law in making such a finding, and as contemplated by 8 U.S.C. §1252(b)(4)(B), that any reasonable adjudicator would be compelled to reject the BIA's underlying finding of fact, that she did not show prejudice because she "presented no significant evidence that her equities outweigh [her] offense." *See also, INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (addressing the standard of review of factual findings).

[3] *See, Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994) (In case asserting ineffective assistance of counsel for not filing a §212(c) application, "proving prejudice requires the Petitioner to make a prima facie showing that had the application been filed, he would have been entitled to relief").

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I. INTRODUCTION

The primary issue presented herein is whether immigrants are entitled to Due Process in the adjudication of applications for statutorily prescribed forms of discretionary relief from removal. Although Respondent asserts that the Fifth Circuit opinion "does not conflict with any decision of this Court or of another court of appeals," (RESP:5), no attempt is made to confront Petitioner's showing that: 1) it conflicts with several Supreme Court decisions, including *U.S. ex rel Accardi v. Shaughnessy,* 347 U.S. 260 (1954) (remanding for an evidentiary hearing in habeas corpus on claim of Due Process violation in adjudicating application for discretionary relief); *U.S. ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957) (addressing denial of discretionary relief); and *Bridges v. Wixon,* 326 U.S. 135, 145 (1945) (Because "the liberty of an individual is at stake . . . [deportation procedures must meet] essential standards of fairness"), (PET:4-5,13)[4] and 2) that the issue has been treated inconsistently among the circuits, and, as is the case with the Fifth Circuit, (PET:14-16), even within a given circuit.

Respondent also ignores Ms. Zamora's claims that the *custody* created by a removal order creates a liberty interest, (PET:4-6), and this Court's precedent holding that Due Process rights attach where, as here, standards have been established for the exercise of discretion, *by settled course of adjudication.* (PET:6-7).

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[4] Petitioner erroneously included *Jay v. Boyd*, 351 U.S. 345, 363 (1956), in this series, (PET:4,12), as the language quoted therein was from the dissenting opinion.

Rather, Respondent raises red herrings such as that Petitioner did not seek certiorari on the BIA's finding that she failed to show prejudice, (RESP:6), and that ineffective assistance of counsel in removal proceedings cannot violate Due Process because immigrants have no right to appointed counsel in such proceedings, (RESP:7). The former is not ripe, because the Fifth Circuit did not rule against her on that point, and the latter is based on an argument which has not been adopted by any Circuit Court of Appeals, and which several circuits, and the BIA, have explicitly rejected.

And even though no act of Congress is challenged herein, Respondent invokes such irrelevant truisms as the quotation from *Fiallo v. Bell,* 430 U.S. 787, 792 (1977), that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens," (RESP:10). Respondent also restates the ultimate issue as if it were black-letter law, (RESP:11):

> Because that discretionary decision implicated no constitutionally-protected liberty or property interest of petitioner's she had no Due Process Clause rights of any sort in those proceedings . . .

In truth, a crucial issue is presented herein, on which there is great confusion in the Courts of Appeals, notwithstanding this Court's decisions such as *Accardi*, which should have settled the matter.

II. REBUTTAL FACTS

In stating the facts, Respondent omits several key points: 1) the $1,000 Ms. Zamora received was to cover the costs of taking the two young girls to Indiana, of which less than $100 was left when she was apprehended,

(APP:28,48); 2) the application for relief was completed, and presented to INS to process the fee, a week before the deadline, leading the IJ to find that the Representative's "explanation for failure to timely file the application or even to request an extension of time" was not a "sufficient reason to [accept] the late filing," (APP:5,6,47); and 3) in finding that Ms. Zamora had not presented "significant evidence that her equities outweigh[ed]" her offense, the BIA made no mention of her equities, the evidence presented in support thereof, or the legal standard applied in making this determination, (APP:3).

III. REBUTTAL ARGUMENT

A. THE FIFTH CIRCUIT'S HOLDING THAT EVEN LPRS ARE NOT ENTITLED TO DUE PROCESS IN MATTERS RELATING DISCRETIONARY RELIEF CONFLICTS WITH VARIOUS DECISIONS OF THIS COURT, WITH OTHER CIRCUIT PRECEDENT, AND EVEN WITH ITS OWN PRIOR DECISIONS.

Respondent's claim that the decision herein conflicts neither with precedent from this Court, nor with that of other circuits, is simply false. To the contrary, as previously shown, (PET:4,13), this Court entertained a Due Process claim in denying discretionary relief in *Accardi*. The fact that, as Respondent notes, (RESP:11-12), the Due Process violation in *Accardi* involved a failure to follow the regulations, whereas here it is ineffective assistance of counsel, is a distinction without a difference. The blanket holding of the Fifth Circuit that aliens have no Due Process rights in the adjudication of applications for discretionary relief is flat-out inconsistent with *Accardi*. And, as was also previously shown, (PET:11-18), there is rampant confusion,

not only among the circuits, but *within* the circuits,[5] on this crucial issue.[6]

B. NEITHER THE BIA, NOR ANY CIRCUIT COURT OF APPEALS, HAS ADOPTED RESPONDENT'S CLAIM (UNDER CASES SUCH AS *COLEMAN*), THAT INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT CAUSE A DUE PROCESS VIOLATION.

Respondent claims that ineffective assistance of counsel in removal proceedings cannot violate Due Process because there is no right to appointed counsel in such proceedings, (RESP:5-11). To date, no Circuit Court of Appeals has adopted this position, and several circuits, and the BIA, have expressly rejected it. (PET:2,7). Although in *Assaad v. Ashcroft,* 378 F.3d 471 (5th Cir. 2004), the Court appeared poised to backtrack on its earlier decisions on this point, such as *Miranda-Lores, supra,* it has not done so.

As Ms. Zamora argued to the Fifth Circuit, cases such as *Coleman* are inapplicable. The pertinent question is not whether she has a constitutional right to appointed counsel, but whether, given the nature of removal proceedings, she is, as this Court held in *Bridges, supra*, entitled to Due Process protections. *See, e.g., Pennsylvania v. Finley,* 481 U.S. 551, 555-6 (1987) (emphasis added):

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[5] Notably, the Fifth Circuit decision at issue even conflicts with its own prior precedent. *See,* (PET:14-16).

[6] Respondent *almost* acknowledges the circuit split on the issue of whether such Due Process rights exist, (RESP:13) ("Even assuming that some disuniformity exists in this area . . . ").

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, *see Johnson v. Avery*, 393 U.S. 483, 488 (1969), and we decline to so hold today. . . .
>
> In *Ross v. Moffitt, supra*, we analyzed the defendant's claim to appointed counsel on discretionary review under two theories. *We concluded that the fundamental fairness exacted by the Due Process Clause did not require appointment of counsel*:
>
> > "It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. . . ."

This Court further noted, *id.* at 546 (emphasis added):

> [T]he fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, *it is the source of that right to a lawyer's assistance, **combined with the nature of the***

> ***proceedings**, that controls the constitutional question. . . .*
>
> We think that the analysis that we followed in *Ross* forecloses respondent's constitutional claim. *The procedures followed by respondent's habeas counsel fully* ***comported with fundamental fairness.***

Thus the issue herein is whether ineffective assistance may affect the "fundamental fairness" of removal proceedings: proceedings where the "accused" has a constitutional right to Due Process, and counsel functions as a shield for a person "'haled into court' by the [United States]." The key factor under the *Finley* analysis is the nature of the proceedings. Ms. Zamora's constitutional rights arise under the Fifth, rather than the Sixth, Amendment, but as seen from *Bridges*, they are equally potent. *See, e.g., Dakane v. Attorney General*, 371 F.3d 771, 774 (11th Cir. 2004):

> It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the constitutional right under the Fifth Amendment Due Process Clause to a fundamentally fair hearing to effective assistance of counsel where counsel has been obtained.

This reasoning applies *a fortiori* where counsel is a non-lawyer, accredited by the BIA to function as if he were an attorney, working for an organization on a "free legal services" list that the regulations mandate be given to all detained aliens, and which the IJ must ensure that they received. And, as previously shown, (PET.22-24), although the BIA is charged with overseeing their conduct, it has eschewed that responsibility, allegedly for lack of resources,

leaving such non-lawyers with no real oversight, and LPRs such as Ms. Zamora vulnerable to their errors.

Thus the fact that the malfeasance was committed by an Accredited Representative, rather than a licensed attorney, *strengthens* Ms. Zamora's claim, but is not *a necessary element* of that claim. This is therefore not a situation where a Due Process violation cannot be claimed absent involvement by a "state actor," to ensure that the government is not charged with responsibility "for conduct for which they cannot fairly be blamed," as Respondent urges, (RESP:9-10). Still, Respondent's failure to discipline the non-lawyers he accredits makes it eminently fair that he enable their victims to obtain relief from the dire consequences of their failings.

C. THE FIFTH CIRCUIT DID NOT REJECT MS. ZAMORA'S CHALLENGE TO THE BIA'S FINDING THAT SHE DID NOT SHOW PREJUDICE FROM HER ACCREDITED REPRESENTATIVE'S FAILURE TO TIMELY FILE HER APPLICATION FOR RELIEF.

Respondent also seems to be under the impression that either the Fifth Circuit sustained the BIA's finding of "no prejudice," or that Ms. Zamora did not raise the issue with that Court. Neither is true. Ms. Zamora did raise the issue with the Fifth Circuit, but the Court did not reach it. Rather, the Court held that *because* Ms. Zamora had no Due Process rights, the BIA did not err in dismissing her appeal for lack of prejudice. (APP:2).

The BIA rejected Ms. Zamora's ineffective assistance claim, without discussion or analysis, allegedly for lack of prejudice. (APP:3):

> Although the respondent claims that her attorney ineffectively represented her, she has not established that she was prejudiced by his representation.... The respondent was convicted of alien smuggling. She has presented no significant evidence that her equities outweigh this offense.

There are several flaws in this assertion. Grammatically, it is unclear whether the BIA found that her (unspecified) equities were insufficient to counterbalance the offense, or that she presented insufficient *evidence* of her equities.[7] Her equities were clearly "outstanding" under BIA and Fifth Circuit precedent.[8] Further, the sole negative factor[9] was the underlying offense: a single, misguided, humanitarian act. Such offenses do not involve moral turpitude.[10] Even if prosecuted as felonies, and therefore, aggravated felonies,[11] they are not "particularly serious crimes" under 8 U.S.C. §1231(b)(3)(B)(ii). *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999). As explained therein, *id.* at 655:

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[7] The record contained a wealth of "evidence." The completed cancellation application showed that she has been an LPR since 1982, has a strong employment history, and numerous relatives in the U.S., all residing in the Rio Grande Valley. The supporting documents included copies of her parents' green cards, the birth certificates of four of her U.S. born siblings, and her recent tax returns, (APP:30-46). To the extent possible where no hearing was held, Ms. Zamora also showed rehabilitation, by prompt acceptance of responsibility, (APP:26-29).

[8] *See, Diaz-Resendez v. INS*, 960 F.2d 493, 496-97 (5th Cir. 1992), and *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988).

[9] *See, Matter of Marin*, 16 I&N Dec. 581, 585 (BIA 1978) (an application for 212(c) relief of necessity carries with it at least one adverse consideration (the ground of exclusion sought waived).

[10] *See, Matter of Tiwari*, 19 I&N Dec. 875 (BIA 1989).

[11] 8 U.S.C. §1101(a)(43)(N).

> In *Matter of Tiwari*, we considered whether alien smuggling for gain is committed with "fraud or evil intent." A review of precedent cases revealed that persons convicted under former section 274(a) for bringing aliens into the United States or for transporting them within the country had been motivated by love, charity, or kindness or by religious principles.

The legal environment surrounding such applications further shows that Ms. Zamora's chances of winning relief were in fact excellent. Under *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998), cancellation applications for LPRs are judged by the same standards as those for §212(c) relief. Over half of §212(c) applications were granted, even when LPRs convicted of drug smuggling and other aggravated felonies were eligible.[12] According to statistics relied upon by this Court in *St. Cyr*,[13] in the years from 1991 through 1995, 8,732 §212(c) applications were granted and 8,333 were denied.[14] Further, LPRs convicted of aggravated felonies are ineligible for cancellation. From this, one can fairly infer that the *percentage* of applications granted has *not* decreased, but has increased. At a minimum, more than half of such applications are doubtless still granted. Thus, as Ms. Zamora urged to the Fifth Circuit, her *statistical* chances of earning relief were better than 50%, and probably much, much higher. Ms. Zamora also urged that under *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995), she was entitled to relief. Her equities are at least as strong as, if not stronger than, those presented therein. The negative factors are also significantly less than in *Arreguin*, which involved the smuggling of a

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[12] *See, INS v. St. Cyr*, 533 U.S. 289, 296, n.5 (2001).

[13] Rannik, 28 U. Miami Inter-Am.L.Rev. 23, 150, n.80 Fall, 1996.

[14] An additional 3,798 applications were shown as "other."

large quantity of marijuana, and a sentence of at least two years, since she was still detained when the BIA granted her appeal, and afforded §212(c) relief.

Therefore, if and when the Fifth Circuit reaches the issue, it will doubtless hold that, as required by *Miranda-Lores, supra*, a *prima facie* case is made by showing that more than half such applications are granted, and that Ms. Zamora's case compares favorably with the benchmark BIA decision granting relief. Alternatively, viewed as a factual finding, the Court may well conclude that "any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. §1252(b)(4)(B). *See, INS v. Elias-Zacarias, supra.*

VII. CONCLUSION

For the foregoing reasons, Ms. Zamora urges this Court to issue a writ of certiorari to the Fifth Circuit, to resolve the inter- and intra-circuit court conflicts on the crucial issue of whether an alien's right to Due Process ceases once a finding of deportability has been made, and to determine whether the extreme consequences which can flow from the ineffective assistance of counsel can cause a failure of Due Process, particularly where counsel is a non-lawyer accredited by the Attorney General to function as an attorney, and as aggravated by the Attorney General's failure to conduct meaningful oversight over such accredited non-lawyers.

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